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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1459.

GUS. LEISY & COMPANY, PLAINTIFFS IN ERROR,

vs

A. J. HARDIN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

FILED OCTOBER 21, 1889.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, NOVEMBER 4, 1889.

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1 *Petition for Writ of Error to the Supreme Court of the United States.*

In the Supreme Court of the State of Iowa.

GUS. LEISY & Co., Plaintiffs & Appellees,
vs.
A. J. HARDIN, Constable, Defendant and Appellant.

To Honorable Josiah Given, chief justice of the supreme court of Iowa:

Your petitioners, Gus. Leisy & Company, respectfully petition and represent—

That in a cause pending in this honorable court, wherein your petitioners, Gus. Leisy & Company, were plaintiffs and appellees and A. J. Hardin, constable, was defendant and appellant, said cause having been brought to the supreme court of Iowa on appeal from a final judgment rendered in said cause by the superior court of the State of Iowa in and for the city of Keokuk, the said supreme court of Iowa, by a final judgment and decision duly filed, announced, and rendered on the 4th day of October, 1889, reversed the judgment of said superior court; that the judgment of said supreme court is final in said cause.

That in the judgment and decision of said supreme court of Iowa there is drawn in question the validity of certain statutes of the State of Iowa, namely, chapter 6 of title XI of the Code of 1873, with the amendments thereto, on the ground that same are in contravention of and repugnant to the Constitution of the United States, and particularly that such laws of the State of Iowa

2 are in contravention of and repugnant to section eight (8) of article I and section two (2) of article IV of the Constitution of the United States.

That the decision and judgment of said supreme court of Iowa is in favor of the validity of the said statutes and laws of the State of Iowa.

That your petitioners herewith present for appeal a bond duly conditioned, executed, and certified as required by law.

That your petitioners also present an authenticated transcript of the record in this cause, an assignment of errors, and a prayer for reversal.

Wherefore your petitioners humbly pray and petition that there be granted unto them and allowed a writ of error to the Supreme Court of the United States, with citation to said A. J. Hardin, constable, to appear and defend in said Supreme Court of the United States on or before the 4th Monday in October, A. D. 1889.

JAMES C. DAVIS,
Counsel for Petitioners.

3 In the Supreme Court of Iowa.

GUS. LEISY & Co., Appellees,
vs.
A. J. HARDIN, Constable, Appellant.

Writ of Error.

UNITED STATES OF AMERICA,
State of Iowa, } ss:

The President of the United States to the honorable judges of the supreme court of the State of Iowa, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of Iowa, before you or some of you, being the highest court of law and equity of the said State of Iowa in which a decision could be had in the said suit between Gus. Leisy & Co., appellees, and A. J. Hardin, appellant, wherein was drawn in question the validity of certain statutes of the State of Iowa on the ground of their being in contravention of and repugnant to the Constitution of the United States, and such decision was in favor of the validity of such statutes of the State of Iowa, a manifest error hath happened, to the great damage of the said Gus. Leisy & Company, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this
4 writ, so that you have the same at Washington on the 4th Monday of October, 1889, in the said Supreme Court to be there and then held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 16th day of October, in the year of our Lord one thousand eight hundred and eighty-nine, and Ed. R. Mason, clerk of the circuit court of the United States in and for the southern district of Iowa.

[Seal U. S. Circuit Court, Southern District Iowa.]

ED. R. MASON,
Clerk U. S. Circuit Court, Southern District of Iowa.

Allowed by—

JOSIAH GIVEN,
Chief Justice of the Supreme Court of Iowa.

Dated October 16, 1889.

5 *Bond.*

Know all men by these presents that we, Gus. Leisy & Co., as principals, and Eph. Radasch and William Ewers, as sureties, are held and firmly bound unto A. J. Hardin, constable, in the full and just sum of five hundred dollars ($500.00), to be paid to the said A. J. Hardin, constable, his certain attorney, executors, administrators, and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 15th day of October, 1889.

Whereas, at the October term, A. D. 1889, of the supreme court of the State of Iowa, in a suit pending in said court between Gus. Leisy & Co., as appellees, and A. J. Hardin, constable, as appellant, judgment and decision was rendered against said Gus. Leisy & Co., and the said Gus. Leisy and Company having obtained a writ of error to the Supreme Court of the United States and filed a copy thereof in the clerk's office of the said court to reverse the jugment and decision in the aforesaid suit, and a citation directed to said A. J. Hardin, constable, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the 4th Monday of October, 1889:

Now, the condition of the above obligation is such that if the said Gus. Leisy & Co. shall prosecute said writ of error to effect and answer all costs if said Gus. Leisy & Co. fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

GUS. LEISY & CO. [SEAL.]
EPH. RADASCH. [SEAL.]
WM. EWERS. [SEAL.]

6 Approved by—
JOSIAH GIVEN,
Chief Justice of the Supreme Court of Iowa.

Dated October 16th, 1889.

STATE OF IOWA, } ss:
Lee County, }

We, Eph. Radasch and William Ewers, the sureties on the foregoing bond, each of us, upon our separate and several oaths, do say that we are each of us worth in real property, free of incumbrance and subject to execution in the State of Iowa, the sum of one thousand dollars ($1,000), as we verily believe.

EPH. RADASCH.
WM. EWERS.

Subscribed and sworn to before me this 15th day of October, A. D. 1889.

[Notarial Seal, James C. Davis, Iowa.]

JAMES C. DAVIS,
Notary Public.

STATE OF IOWA, }
Lee County, }

I, J. B. McNamara, clerk of the district court of Lee county, Iowa, do hereby certify that Eph. Radasch and William Ewers, the sureties on above bond, are personally known to me, and if said bond was presented to me for approval I would approve same.

Witness my hand and seal of said court this 15th day of October, A. D. 1889.

[Seal of the District Court of Lee County, Iowa.]

J. B. McNAMARA,
Clerk of Dist. Court.

7 *Citation.*

The United States of America to A. J. Hardin, constable, H. Scott Howell & Son and W. B. Collins, his attorneys, Greeting:

You and each of you are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 4th Monday of October, 1889, next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa, wherein Gus. Leisy & Company are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment and decision rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be obtained by the parties in that behalf.

Witness the Honorable Josiah Given, chief justice of the supreme court of Iowa, this 16th day of October, A. D. 1889.

JOSIAH GIVEN,
Chief Justice of the Supreme Court of Iowa.

A true copy of the above citation was duly delivered to us this 16th day of October, A. D. 1889, and we accept due and legal service of same, waiving all defects, if any there be, as to time when this cause is set down for hearing, and we herewith enter our general appearance in this cause.

H. SCOTT HOWELL,
W. B. COLLINS,
Att'ys for Defendant, A. J. Hardin, Constable.

8 *Return to Writ of Error.*

UNITED STATES OF AMERICA, }
State of Iowa, } *ss:*

In obedience of the command of the within writ of error, I, G. B. Pray, clerk of the supreme court of the State of Iowa, herewith transmit to the Supreme Court of the United States a duly certified transcript of all the record and proceedings in the within-entitled cause, together with all things concerning the same, said transcript being herewith attached.

In witness whereof I hereunto subscribe my name and affix the seal of said supreme court of Iowa, at the city of Des Moines. Done this 16th day of October, A. D. 1889.

[Seal of the Supreme Court of Iowa.]

G. B. PRAY,
Clerk of Supreme Court of Iowa.

UNITED STATES OF AMERICA, } ss:
State of Iowa, }

Be it remembered that heretofore, to wit, on the 6th day of December, A. D. 1888, there was filed in the office of the clerk of the supreme court of the State of Iowa a record in the case of Gus. Leisy & Co., appellees, *v.* A. J. Hardin, appellant, which is in words and figures as follows, to wit:

In the Supreme Court of Iowa. January Term, 1889.

GUS. LEISY & Co., Appellees,
vs.
A. J. HARDIN, Constable, Appellant. } At Law.

Appeal from Hon. H. Bank, Jr., judge superior court, city of Keokuk, Lee county, Iowa.

Anderson & Davis, att'ys for appellees; Wm. B. Collins and H. Scott Howell & Son, att'ys for appellant.

Appellant's Abstract of Record and Assignment of Errors.

On July 2, 1888, plaintiffs (appellees) filed in the clerk's office of the superior court of the city of Keokuk, Lee county, Iowa, a duly verified petition stating their cause of action as follows, to wit:

That plaintiffs were a firm of that name, composed of citizens and residents and doing business as brewers in Peoria, Ill.; that defendant was the duly elected and qualified marshal of the city of Keokuk, and by virtue of such office was *ex officio* constable of Jackson township, Lee county, Iowa.

10 That plaintiffs were the manufacturers and the absolute and unqualified owners and entitled to the immediate possession of 122 one-quarter barrels of beer—value, $300.00; 171 one-eighth barrels of beer—value, $215.00—and 11 sealed cases of beer—value, $25.00—the possession of which defendant deprived them under and by virtue of a warrant and order from J. G. Garretson, an acting justice of the peace in and for Jackson township, Lee county, Iowa, issued upon a sworn information filed before him, a copy of which, marked "Exhibit A," was attached to and made part of said petition, which shows that L. H. Ayer, a citizen of Keokuk,

Lee county, Iowa, on the 30th of June, 1888, in a proceeding entitled The State of Iowa, plaintiff, *vs.* G. A. Leisy, John Leisy, Edw. Leisy, Mrs. John Leisy, and certain intoxicating liquors, defendants, made oath that he had good reason to and did believe that certain intoxicating liquors, to wit, beer, were in a large brick building situated on lots 10, 11, and 12, block 201, in the city of Keokuk, Lee Co., Iowa, known as Leisy's brewery; that said liquor was owned and kept by said parties there with the intention by them to be sold in violation of laws of the State of Iowa; that he had reason to believe and did believe that within one month next before the making of such oath and information intoxicating liquors had been sold in violation of laws of Iowa in said building by said John Leisy and other parties, defendants, and with their knowledge and consent.

That said information was filed under and by virtue of chapt. 6, title XI, and the amendments thereto of the Code of Iowa (1873).

That the beer was not in plaintiffs' possession with intention of violating any provision of the law of Iowa.

But that said law of Iowa was unconstitutional and void, being in conflict with section 8, article 1, Constitution of the United States, which provides "that Congress shall have power to regulate commerce among the several States."

That the warrant under which defendant held said property
11 (beer) was without authority and void; that plaintiffs had made demand of defendant for said property, which was refused.

That plaintiffs were citizens and residents of Peoria, Illinois, having their principal place of business in that place, where they were engaged in the manufacture, importation, and sale of beer in the States of Illinois and Iowa, and were engaged in interstate traffic and commerce.

That this beer in question was all in the original kegs and packages in which it was placed at the time of its manufacture in Peoria, Ill.; that each keg was sealed and had upon it the U. S. revenue stamp required by law, which stamp remained unbroken at the time of the seizure by defendant.

That plaintiffs had transported said original and unbroken packages of beer from Illinois into Iowa for sale in the same form by means of common carriers engaged in interstate commerce between said States.

That the only sales or offers of sale of said beer by plaintiffs in Iowa were in said original packages.

That plaintiffs had been damaged by the wrongful detention by defendant of said beer in the sum of $500; that, the defendant being the executive officer of said court, plaintiffs asked that the process in the case might be served by the sheriff of said county.

Prayer for a judgment finding plaintiffs to be the owner and entitled to the immediate possession of said property; that a writ of replevin be issued, directed to sheriff of said county, to take possession of and deliver said property to plaintiffs, with judgment for $500 damages and costs against said defendant.

And at the same time, July 2, 1888, plaintiffs presented to said court their replevin bond, with Oswald Schmied and David Santo sureties, in the sum of eleven hundred dollars to A. J. Hardin, defendant, conditioned that they would prosecute said suit to judgment and return said property taken by them if a return
12 should be awarded and pay all costs and damages that should be awarded against them, which said bond was then duly approved and filed by the clerk of said court.

And thereupon a writ of replevin, dated July 2, 1888, was then, by the clerk of said court, issued under the seal of said court in said case, directed to the sheriff of said county, directing him in the name of the State of Iowa to take from the possession of said A. J. Hardin, constable, the said 122 one-quarter barrels of beer, 171 one-eighth barrels of beer, and 11 sealed cases of beer, and to deliver them to plaintiff, and to make due return of his doings, with said writ, unto said court on or before September 3rd, 1888.

And thereafter, to wit, on the 3rd day of September, 1888, W. P. Marshall, sheriff of Lee county, Iowa, brought said writ into said court with his return endorsed thereon, to wit, that said writ came into his hands July 2, 1888, and that on same day he executed same by taking from the possession of said A. J. Hardin, constable, defendant, said 122 one-quarter barrels of beer, 171 one-eighth barrels beer, and 11 sealed cases of beer, and delivered same to said plaintiffs, Gus. Leisy & Co., in the city of Keokuk, Lee county, Iowa.

And thereafter, on the 24th day of September, 1888, the defendant filed in said court his verified answer in said case, stating he denied each and every allegation of said petition not specifically admitted; that he admitted he was a constable of Jackson township, Lee county, Iowa, and as such, in his official capacity at the time stated, had seized and held in his possession the 122 ¼ barrels, the 171 ⅛ barrels, and the 11 sealed cases of beer of, the value stated, under and by virtue of a search warrant issued by J. G. Garrettson, justice of the peace of Jackson township, Lee county, Iowa, upon an information duly verified and filed with him in a proceeding
13 wherein The State of Iowa was plaintiff and John Leisy, E. C. Leisy, G. A. Leisy, and Mrs. John Leisy were defendants, in a criminal proceeding under the provisions of sections 1544, 1545, and 1546, chapter 6, title 11, Code of 1873, and amendments thereto, and that at the time this suit was filed and the writ of replevin was issued he held the custody of said property under the said warrant, and subject to the orders of said justice of the peace.

Denied that plaintiff was the absolute owner or was entitled to the possession of said property.

Denied said chapter 6, title 11, Code of 1873, and amendments thereto were unconstitutional or void or contravened section 8, article 1, of the Constitution of the United States, and denied plaintiff had been damaged in any amount whatever.

And defendant further stated he had no knowledge and not sufficient information to form a belief as to the truth of the allegations of said petition about the "original packages," where put up, where

shipped from, and how brought into the State of Iowa, and on all this demanded due proof.

Defendant asks for judgment for return of property to defendant, or, in default thereof, judgment for its stated value and for costs.

And thereafter, to wit, on the 24th day of September, 1888, this cause came on for hearing, and a jury was duly waived by the parties and the cause was submitted to the court upon the papers, exhibits, and evidence as follows, to wit:

Evidence for Plaintiffs.

Examined by J. C. DAVIS, attorney:

JOHN LEISY, a witness of lawful age, called by plaintiffs, and being first duly sworn, says:

I am acquainted with the firm of Gus. Leisy & Co., of
14 Peoria, who own and are operating a brewery at that place. I am their agent. The firm is composed of Christine Leisy, Edward Leisy, Lena and Albert Leisy, all of whom are citizens of and reside in Peoria, Illinois. Said firm owns the beer described in the petition of said plaintiffs which was seized by the defendant on the 30th of June, 1888, upon the writ issued by Garrettson, a justice of the peace.

This beer had been sent by said Gus. Leisy & Co. from Peoria to Keokuk by railroad, and at the time it was seized by Constable Hardin, the defendant, it was stored away in premises owned by Christine Leisy on the corner of 13th and Johnson streets (Keokuk), which premises had cellars and other proper facilities for keeping keg and bottled beer. Mrs. Christine Liesy resides in Peoria, Ill.

These 122 quarter barrels and 171 eighth barrels of beer which were seized by the defendant had the Government stamp on them, usually placed over the cork hole, with an extra seal over that to protect the stamp, which stamp had to be broken in taking out the cork.

The cases of beer contained 24 quart bottles each. Each case was sealed with a wire passing through a leaden seal, which had to be broken to open the case; and each bottle had a cork in it, and was sealed with a wire or string and a metal cap, and these had to be broken to open the bottle.

I offered for sale and sold said beer only in the said original packages; did not offer or sell any parts of kegs or cases of beer, and when sold it was at once removed from said premises.

I did not know for what purposes the parties bought the beer.

Cross-examination by W. B. COLLINS, attorney:

I am agent of Gus. Leisy & Co., the plaintiffs. Christine Leisy owns the property on corner of 13th and Johnston streets, lots 10, 11, and 12, block 201 (Keokuk). I do not know whether said firm have any interest in the real estate.

The firm manufactures beer—generally lager beer—from
15 malt and hops, so far as I know. All members of firm reside at Peoria. These kegs and cases of beer were brought from Peoria to Keokuk by railroad.

I am the agent of said firm in Keokuk, Iowa, and receive and sell in Keokuk, Iowa, the beer manufactured by them in Peoria, Ill. The said firm sends this beer to Iowa to be sold in Iowa. As their agent I receive and sell it in Iowa and I was offering it for sale and proceeding to sell it in Keokuk at the time it was seized. This lot which was seized on the 30th of June, 1888, was received by me on the 27th or 28th (June), if I remember.

This beer which was seized was delivered to me by the transportation company down at the railroad yards by the river, in Keokuk, Iowa, and was transported from there to the brewery warehouse on the corner of 13th and Johnsone streets by teams. I don't remember exactly how much beer was shipped to me by said Gus. Leisy & Co. on or about the 27th of June, 1888. There was not a car-load of it, but there was more than this load which was seized.

I have been the agent of Gus Leisy & Co. in the city of Keokuk since 1884, during all of which time they have been engaged in selling beer in said city.

"Quest. 28. About how many quarter barrels of beer per day has the firm of Gus. Leisy & Co. sold in the city of Keokuk?"

"Answer. Quarter barrels?"

"29. A quarter barrel is about eight gallons?"

"Answer. Yes, sir."

Objection.—Counsel for plaintiffs objects to this line of examination as incompetent and immaterial and not proper cross-examination.

Objection sustained.

Defendant excepts.

After this writ of replevin was issued the beer, which had been seized by defendant Hardin, was delivered to Gus. Leisy & Co. through myself as their agent.

16 Witness testified, against the objection of plaintiffs, that he sold this particular beer which had been replevied.

"Question 33." Has Gus. Leisy & Co. under the law of the United States a license to sell beer here in the city of Keokuk, Iowa?

Objection.—Counsel for plaintiff objects as incompetent, immaterial, and irrelevant.

Objection sustained.

Defendant excepts.

This beer described in petition was put up in Peoria, Ill., by Gus. Leisy & Co., in the quarter barrels, eighth barrels, and bottles mentioned, and offered them and sold them in the same packages in Keokuk, Iowa.

All the business I was ever engaged in as the agent of Gus. Leisy & Co. was to sell their beer for them as they shipped it to me in the city of Keokuk, Iowa.

Against the objection of plaintiff, witness says he sold the beer in Keokuk.

Resuming, witness states without objection: We deliver this beer, after it is sold, about the city (Keokuk) in wagons or otherwise. We sell to any person above age who pays us the money for it. All sales are made here in Keokuk, Lee county, Iowa, for Gus. Leisy & Co. I ship a little outside once in awhile.

This particular beer in question was here in my possession, as the agent of Gus. Leisy & Co., for sale at the time it was seized, and I was offering it for sale at that time.

Redirect examination by Mr. DAVIS:

The only sales or offers of sale that I made were, as I have described, in the original form in which I received the goods of Gus. Leisy & Co., of Peoria, Ill.

I don't sell to minors or to persons in the habit of becoming intoxicated.

Recross-examination by COLLINS:

17 I sell to every other person that applies to me. I make diligent inquiries whether they are minors. I know pretty well all the persons who are in the habit of getting intoxicated by the length of time I have been in business in Keokuk, Iowa.

Witness excused.

Agreement.

It is agreed that there is a proceeding in the United States circuit court for an injunction, which suit is entitled William Burkitt, plaintiff, *vs.* Christine Leisy *et al.*, which suit was removed to the United States circuit court upon petition of Gus. Leisy & Co., and no steps have yet been taken in said case whatever.

Defendant's Evidence.

Counsel for defendant then offered in evidence the information for a search warrant, entitled The State of Iowa against John Leisy, Edward C. Leisy, G. A. Leisy, Mrs. John Leisy, and certain intoxicating liquors, before J. G. Garrettson, justice of the peace, of Jackson township, Lee county, Iowa, which information is sworn to by L. H. Ayer, a credible resident of said county, and which was filed by said justice on the 30th of June, 1888, wherein it is stated by said Ayer under oath that he has good reason to believe and that he does believe that intoxicating liquors, to wit, beer, are in a large brick building situated on lots 10, 11, and 12, block 201, on Johnson street, in city of Keokuk, Lee county, Iowa, known as Leisy's brewery; that said liquors are owned and kept by the above-named parties, who are known and doing business as Leisy Bros., and are intended by them to be sold in violation of the laws of the State of Iowa; and affiant has good reason to believe and does believe that

within one month next before the making of the said information intoxicating liquor has been sold, in violation of the laws of Iowa, in said house, place, or some dependency thereof by said John Leisy and other parties above named and by their consent and permission, same being Exhibit No. 1.

Counsel for defendant then next offered in evidence the
18 search warrant (with the return thereon) issued on said information by said J. G. Garrettson, justice of the peace of Jackson township, Lee county, Iowa, dated June 30, 1888, in said proceedings of The State of Iowa, *was* plaintiff, against John Leisy, Edward C. Leisy, G. A. Leisy, Mrs. John Leisy, and certain intoxicating liquors, defendants, and directed to the marshal of the city of Keokuk, Iowa, to the sheriff of Lee county, or to any constable of Lee county, Iowa, and stating that whereas information had been duly filed before him, the said justice of the peace, by a credible resident of said county, charging that certain intoxicating liquors, to wit, beer, were in a large brick building situated on lots 10, 11, and 12, block 201, on Johnson street, in the city of Keokuk, Lee county, Iowa, known as Leisy's brewery; that said liquors were owned and kept in said premises with the intent to sell the same contrary to law, and thereupon commanding said officers to thoroughly search the said premises above described and to seize the said liquor found thereon, with the vessels containing it, and to keep the same securely until final action thereon, and that the officer forthwith serve said writ and return the same to said court with the officer's return endorsed thereon; upon which search warrant was duly endorsed and subscribed by said A. J. Hardin, constable, &c., his return, as follows, to wit:

"The within search warrant came into my hands on the 30th day of June, 1888, and I served the same on the same day by searching the within-described premises for intoxicating liquor, to wit, beer, and I found one hundred and twenty-two one-quarter kegs, one hundred and seventy-one one-eighth kegs, and eleven cases of beer, and by consent of J. W. Leisy I locked the above-described property up in the cellar on the premises; all of which was done in the township of Jackson, Lee county, Iowa." Same being Exhibit No. 2 of defendant's evidence.

And defendant then next offered in evidence the notice of seizure
19 of said intoxicating liquors (with the officer's return thereon) issued by said J. G. Garrettson, justice of the peace, and dated 30th of June, 1888, in said proceedings pending before him, wherein The State of Iowa was plaintiff and said John W. Leisy, Edward C. Leisy, G. A. Leisy, Mrs. John Leisy, and certain intoxicating liquors were defendants, and directed to said John Leisy, Edward C. Leisy, G. A. Leisy, Mrs. John Leisy, and all others whom it may concern, and stating that whereas by a warrant of search and seizure that day by said justice issued upon information filed, alleging that certain intoxicating liquors were kept for sale contrary to law by said John W. Leisy, Edward C. Leisy, G. A. Leisy, and Mrs. John Leisy upon certain premises, to wit, a large brick building situated on lots 10, 11, and 12, block 201, on Johnson street, in Keo-

kuk, Lee county, Iowa, and known as Leisy's brewery, and had been seized upon said premises by the officers of the law, to wit, one hundred and twenty-two one-quarter kegs of beer, one hundred and seventy-one one-eighth kegs of beer, and eleven cases of bottled beer:

That now, therefore, in the name of the State of Iowa, the said John W. Leisy, Edward C. Leisy, G. A. Leisy, Mrs. John Leisy, and all others whom it might concern were summoned to appear before said justice, at his office, in the city of Keokuk, Jackson township, Lee county, Iowa, on the 7th day of July, 1888, at 2 o'clock p. m., and to show cause, if any they have, why said intoxicating liquors, together with the vessels containing the same, should not be forfeited, &c.

Upon which notice was duly endorsed and subscribed by said A. J. Harding, constable, &c., the following return of service, to wit:

"The within notice came into my hands on this 30th day of June, 1888, and I served the same on the same day by reading the same to and delivering a true copy of the same to John W. Leisy. I also delivered to him copies for Edward C. Leisy, G. A. Leisy, and Mrs. John Leisy, they not being found in this county. I also posted a true copy upon the within-described building; all of which was done in the township of Jackson, Lee county, Iowa.

"(Signed) A. J. HARDIN, *Constable.*"

Evidence closed.

The original short-hand notes of evidence in said cause are endorsed as follows: "Filed September 24, 1888. John W. Cahill, clerk superior court."

Attached to said short-hand notes in this cause appears the following:

Certificate of Judge.

"I, Henry Bank, Jr., judge of the superior court, city Keokuk, Lee county, Iowa, do hereby certify that the foregoing pages, numbered one to six, inclusive, are the short-hand notes taken by Chas. J. Smith, official reporter, of the evidence offered in the trial of the cause wherein Gus. Leisy & Co. are plaintiffs and A. J. Hardin, constable, is defendant, which, in connection with the papers and depositions therein referred to as offered in evidence, contain all the evidence offered, together with the objections, motions, rulings of the court, and exceptions thereto at the time made and taken.

"Witness my hand, at Keokuk, Iowa, this 23d day of September, 1888.

"HENRY BANK, JR.,
"*Judge of the Superior Court.*"

And at the end of said transcript of evidence is the certificate of Chas. J. Smith, official reporter of said court—

That the foregoing nineteen pages contain a correct and — transcript of the short-hand notes taken by him of the evidence offered in said cause, which, with attached copies of papers therein referred to in evidence, contain all the evidence offered, together with the objections, rulings of the court, and exceptions thereto at the time made and taken in said cause.

21 At the proper time, a request having been duly made by defendant for the court to give its decision in writing, stating separately the facts found and the legal conclusions founded thereon, and the court, having taken said cause thus submitted to it upon the foregoing evidence under consideration, afterwards, to wit, on the 13th day of October, 1888, rendered and filed in said cause its findings of fact and conclusions of law in words and figures following, to wit:

1st. "That plaintiffs, Gus. Leisy & Co., are a firm of that name and style residing in the State of Illinois, with principal place of business at Peoria, Illinois; that said firm is composed wholly of citizens of Illinois; that said firm is engaged as brewers in the manufacture of beer in the said city of Peoria, Illinois, selling same in the States of Illinois and Iowa.

2nd. "That the property in question, to wit, 122 one-quarter barrels of beer, of the value of $300.00; 171 one-eighth barrels of beer, value $215.00, and 11 sealed cases of beer, value of $25.00, was all manufactured by said Leisy & Co. in the city of Peoria, Illinois, and put up in said kegs and cases by the manufacturers, viz., Gus. Leisy & Co., at Peoria, Illinois; that each of said kegs was sealed and had placed upon it, over the plug in the opening of each keg, a United States internal revenue stamp of the district in which Peoria is situated; that said cases were substantially made of wood, each one of them containing 24 quart bottles of beer, each bottle of beer corked and the cork fastened in with a metallic cap, sealed and covered with tin-foil, and each case was sealed with a metallic seal; that said beer in all of said kegs and cases was manufactured and put up into said kegs and cases as aforesaid by the manufacturers, to wit, Gus. Leisy & Co., plaintiffs in this suit, and to open said cases the metallic seals had to broken.

3rd. "That the property herein described was transported by said Gus. Leisy & Co. from Peoria, Illinois, by means of railways
22 to Keokuk, Iowa, in said sealed kegs and cases as same was manufactured and put up by them in the city of Peoria, Illinois.

4th. "That said property was sold and offered for sale in Keokuk, Iowa, by John Leisy, a resident of Keokuk, Iowa, who is agent for said Gus. Leisy & Co.; that the only sales and offers to sell of said beer was in the original keg and sealed case as manufactured and put up by said Gus. Leisy & Co. and imported by them into the State of Iowa; that no kegs or cases sold or offered for sale were broken or opened on the premises; that as soon as same was purchased it was removed from the premises occupied by Gus. Leisy & Co., which said premises are owned by Christiana Leisy, a member of the firm of Gus. Leisy & Co., residing in and being a citizen of

Peoria, Illinois; that none of such sales or offers to sell were made to minors or persons in the habit of becoming intoxicated.

5th. "That on the 30th day of June, 1888, the defendant, *who* as constable of Jackson township, Lee county, Iowa, by virtue of a search warrant issued by J. G. Garrettson, an acting justice of the peace, of said Jackson township, upon an information filed charging that in premises occupied by said John Leisy there *was* certain intoxicating liquors, &c., seized the property therein described and took same into his custody.

6th. "And the court finds that said intoxicating liquors thus seized by the defendant in his official capacity as constable were kept for sale in the premises described in the search warrant in Keokuk, Lee county, Iowa, and occupied by Gus. Leisy & Co. for the purpose of being sold, in violation of the provisions of the laws of Iowa, but which laws, the court holds, are unconstitutional and void, as herein stated.

7th. "That on the 2nd day of July, 1888, plaintiffs filed in this court their petition, alleging, among other things, that they were the owners and entitled to the possession of said property, and that the law under which said warrant was issued was unconstitutional and void, being in violation of section 8 of article 1 of the
23 Constitution of the United States, and having filed a proper bond a writ of replevin issued and the possession of said property was given to plaintiffs.

"From the foregoing facts the court finds the following conclusions:

"That plaintiffs are the sole and unqualified owners of said property and entitled to the possession of same and judgment for $1.00 damages for their detention and costs of suit; that so much of chapter 6, title II, of the Code of 1873, and the amendments thereto, as prohibits such sales by plaintiffs as were made by plaintiffs is unconstitutional, being in contravention of section 8 of article I of the Constitution of the United States; that said law has been held unconstitutional in a like case heretofore tried and determined by this court, involving the same question, in the case of Collins *vs.* Hills, decided prior to the commencement of this suit and prior to the seizure of said property by defendant; to all of which the defendant at the time excepted.

"(Signed) HENRY BANK, JR., *Judge.*"

And there*fore* on the 13th day of October, 1888, the court rendered and there was entered of record a judgment in said cause in the words and figures following, to wit:

"This cause coming on for hearing, plaintiffs appearing by Anderson & Davis, their attorneys, and the defendant by H. Scott Howell & Son and Wm. B. Collins, his attorneys, and the cause coming on for final hearing on the pleadings on file and the evidence introduced, — makes the special finding of facts and law herewith ordered to be made of record and finds that plaintiffs are the sole and unqualified owners and entitled to possession of the following-described personal property, to wit: 122 one-quarter (¼) barrels of beer of the

value of $300.00; 171 one-eighth (⅛) barrels of beer of the value of $215.00, and eleven (11) sealed cases of beer of the value — $25.00.

24 "That, plaintiffs being in possession of said property by virtue of a bond heretofore given, said possession in plaintiffs is confirmed. The court further finds that the writ issued by J. G. Garrettson, a justice of the peace, under which defendant held possession of said property and seized same, is void, same having been issued under sections of the law (of Iowa) that are unconstitutional and void.

"That plaintiff *is* entitled to one dollar damages for the wrongful detention of said property.

"It is therefore ordered and considered by the court that the plaintiffs have and recover of defendant the sum of one dollar, damages, and costs of this action, taxed at $—.

"To which findings, order, and judgment of court the defendant at the time excepts and asks until the 31st day of October, 1888, to prepare and file his bill of exceptions, which request is granted and order hereby made."

And thereupon, on the 13th day of October, the defendant filed in said cause and court his motion for a new trial in the words and figures following, to wit:

"Now comes defendant and moves the court for a new trial in the above-named cause—

"1st. Because the findings of fact and the decision of the court *is* not sustained by sufficient evidence.

"2nd. Because the findings and conclusions of law and the decision of the court are contrary to law."

And thereupon, on the 13th day of October, 1888, the court made and there was entered of record a final judgment entry overruling said motion for a new trial in the words and figures following, to wit:

"This cause coming on for hearing upon the motion of defendant for a new trial, and the matter thereof being submitted to and duly considered by the court, the court overrules said motion;

25 to which action of the court the defendant at time excepted and asks the court until the 31st day of October to prepare have signed, and file his bill of exceptions, which is hereby granted."

And thereafter, to wit, on the 25th day of October, 1888, there was allowed and signed by the judge and filed by the clerk of said court in said cause by defendant his

Bill of Exceptions.

Be it remembered that on the 2nd of July, 1888, the plaintiffs in this cause filed their verified petition, as hereinbefore set forth, and at the same time filed also their bond, as hereinbefore set out; and on the 2nd day of July, 1888, the clerk of the court, having approved said bond, issued in said cause, under the seal of said court, a writ of

replevin in said cause, as hereinbefore set out; and thereafter the officer to whom said writ was directed filed said writ into court with his return thereon, as hereinbefore set out; and thereafter, on the 24th of September, 1888, the defendant filed in said cause his answer to said petition, as hereinbefore set out.

"And afterward, on the 1st day of October, 1888, this cause coming on for a hearing, a jury was waived by all parties, and the court was duly requested by the defendant to make a special finding of facts and conclusions of law in said cause. The case proceeded to trial before the court, and all the evidence therein offered was taken down in writing by the official reporter of said court, and was duly certified by the judge of said court as being all the evidence offered and produced by the parties, with the exceptions and objections thereto taken by the parties, as therein noted, which evidence and certificates of the judge and official reporter thereto are hereinbefore set forth.

"And after all the evidence was offered and introduced and after argument of counsel the court took said cause under advisement until the 13th day of October, 1888, and then, on the 13th day of October, 1888, the court rendered and filed its written findings of facts and conclusions of law, and defendant duly excepted
26 thereto, which are hereinbefore set out; and on said 13th of October, 1888, the court rendered its judgment in favor of plaintiffs in this cause, and defendant duly excepted thereto, which is hereinbefore set out; and thereupon, on the 13th of October, 1888, and during the said October term of said court, the defendant filed his motion for a new trial, which is hereinbefore set out; and thereafter, on the 13th of October, 1888, the court, on due consideration thereof, overruled said motion for a new trial and defendant duly excepted thereto, and asked the court until the 30th day of October, 1888, to prepare and file his bill of exceptions herein, which the court allowed, all of which is hereinbefore set out; and now, on this 25th of October, 1888, the defendant presents this his bill of exceptions, which the court allows and signs as a full, true, and correct bill of exceptions in said cause, and also certifies that the evidence in this bill of exceptions is all the evidence offered by the parties to this suit, and shows all the exceptions at the time taken thereto, and that all the papers, pleadings, exhibits, and journal entries in said cause are correctly set forth by copy in this bill of exceptions.

"Witness my hand on this 25th day of October, 1888.

"HENRY BANK, JR.,

"*Judge Superior Court, Keokuk, Lee County, Iowa.*"

Notice of Appeal.

On the 28th day of November, 1888, the defendant duly served a notice of appeal, signed by his attorneys, upon Anderson & Davis, attorneys for plaintiffs, and upon John W. Cahill, clerk of said superior court, that he had taken an appeal from the findings, orders, and judgment of the court made and rendered in said cause at the October term, 1888, of said court to the supreme court of the State

of Iowa, and that said appeal will be heard in said supreme court at the ensuing January term, to commence on the third Tuesday of January, 1889, and said Cahill, clerk, was duly secured his fees for a transcript in said cause.

27 *Appellant's Assignment of Errors.*

I.

The court erred in finding that the plaintiffs were the sole and unqualified owners and were entitled to the possession of the intoxicating liquors seized and held by appellant.

II.

In finding that the plaintiffs were entitled to one dollar damages for their detention, and for costs of suit.

III.

The court erred in holding that the sales of beer in "original packages," by the keg and case, as made by John Leisy, agent of plaintiffs, were lawful.

IV.

The court erred in its conclusions and finding that so much of the law of the State of Iowa embraced in chapter 6, title II, Code of 1873 and the amendments thereto, as prohibits such sales of beer in the State of Iowa was unconstitutional, being in contravention of section 8, article I, of the Constitution of the United States.

V.

The court erred in rendering a judgment for plaintiffs and awarding them the intoxicating liquors in question and damages and costs against defendant.

VI.

The court erred in overruling the defendant's motion for a new trial.

WILLIAM B. COLLINS AND
H. SCOTT HOWELL & SON,
Attorneys for Appellant.

Short-hand reporter's fees, $4.00, paid by appellant.

28 (Here followed index. Omitted in printing. See general index.)

And afterwards, to wit, at the May term, 1889, of said supreme court of Iowa, the cause having been duly argued by counsel, was submitted to the court.

29 And on the 4th day of October, 1889, said court duly announced and filed its opinion and decision in words and figures following, to wit:

In the Supreme Court of Iowa.

GUS. LEISY & Co.
vs.
A. J. HARDING, Appellant } 14254, 217.

Appeal from the superior court of Keokuk.

H. BANK, Jr., *judge:*

This is an action for replevin, and involves the right to the possession of certain half barrels, quarter barrels, and cases of beer.

There was a trial by the court without a jury, which resulted in a judgment for the plaintiffs. Defendant appeals.

Wm. B. Collins and H. Scott Howell & Son, for appellant.
Anderson & Davis, for appellees.

ROTHROCK, *J.:*

There is no controversy as to the facts of the case. The court below made special findings, from which it appears that the plaintiff is a partnership, the individual members of which are citizens and residents of the State of Illinois. Said partnership is engaged in the manufacture of beer at the city of Peoria, in that State, and selling the same in the States of Illinois and Iowa. The property in question consisted of one hundred and twenty-two quarter barrels of beer and eleven sealed cases of beer.

All of said beer was manufactured by plaintiffs at said city of Peoria, Illinois, and put in said kegs and cases, and each of said kegs was sealed and had placed upon it, over the plug in the opening of each keg, a United States internal revenue stamp, and said cases were substantially made of wood, each one of them containing 24 quart bottles of beer, corked and the cork fastened with metallic cap sealed and covered with tin-foil, and each case was sealed with a metallic seal, and to open said cases the metallic seals had been broken.

The property as above described was shipped by plaintiffs by railway from said city of Peoria to the city of Keokuk, in this State, to one John Leisy, a resident of Keokuk, who is an agent of plaintiff, and placed in a building owned by a member of the plaintiff partnership. It was placed in said building to be sold on account of plaintiff. It was offered for sale in said kegs and cases unbroken. This business had been carried on for several years.

The agent of plaintiffs made the sales to any and all persons who desired to purchase the same, excepting to minors and persons in the habit of becoming intoxicated. No kegs or cases sold were broken or opened in the premises when sold, but they were removed from the building in the same condition in which they were shipped from the State of Illinois. The evidence shows that the agent of the plaintiff delivered the beer sold to the purchasers in the city in wagons or otherwise, and that sales were made to any person above

age who paid the money for it. The building in which the beer was sold was fitted up for the purpose of carrying on the business, and had been used by plaintiffs in that way since the year 1884.

The defendant is a constable and the beer in controversy was seized by him by virtue of a search warrant issued by a justice of the peace, upon the ground that said beer was kept for sale in violation of the laws of the State.

The court found as a fact that the beer in question was kept for sale by the plaintiffs for the purpose of being sold in violation of the laws of Iowa; that said laws are unconstitutional and void as applied to the facts of this case.

31 We have stated the facts somewhat in detail for the purpose of demonstrating that they present the same question determined by this court in the case of Collins *vs.* Hill, 41 N. W. Rep., 671, and in Greendorf *vs.* Honatt, *id.*, 573.

Counsel for appellees conceded in argument that the cases cited involve the controlling question.

It is true that they claim in this case there is the exception that the plaintiffs and appellees are citizens and residents of Illinois and produce and manufacture their beer in that State and sell it as manufacturers; but no claim is made in argument and we can discover no reason why the laws of this State, which forbid the sale of intoxicating liquors, are not applicable to all persons, no matter where they may abide.

We adhere to the rule announced in the cited cases and have no desire to further discuss or elaborate the questions involved.

The judgment of the superior court will be reversed.

32 And on the 4th day of October, A. D. 1889, said supreme court of Iowa rendered the following judgment in said cause, to wit:

33 Supreme Court of Iowa, of Des Moines. October Term, A. D. 1889.

Gus. G. Leisy & Co., Appellees, *vs.* A. J. Hardin, Constable and City Marshal, Appellant.	Appeal from Superior Court, at Keokuk, Lee County, Iowa.

Hon. Henry Bank, Jr., judge; J. C. Davis, attorney for appellees; H. Scott Howell & Son and W. B. Collins, attorneys for appellant.

Judgment Entry.

This day this cause coming on for hearing upon the motion of the appellant for judgment in accordance with the opinion heretofore rendered and filed in this cause on the 4th day of October, A. D. 1889, the appellees, Gus. Leisy & Co., appeared by J. C. Davis, their attorney, and the appellant, A. J. Hardin, constable and city marshal, by H. Scott Howell & Son and W. B. Collins, his attorneys, and

a copy of the replevin bond having been filed with the said motion, and the said motion and this entry having been duly served on the appellees by personal service on J. C. Davis, their attorney, and the court, being fully advised in the premises, finds the value of the property replevied by the appellees from the appellant to be as follows: One hundred and twenty-two (122) quarter barrels of beer, three hundred dollars ($300); one hundred and seventy-one (171) one-eighth barrels of beer, two hundred and fifteen dollars ($215), and eleven (11) sealed cases of beer, twenty-five dollars ($25); and that the plaintiffs are not and were not at the com-
34 mencement of this suit the owners or entitled to the possession of the said property, but the defendant, A. J. Hardin, constable and marshal, is the owner thereof and entitled to the immediate possession thereof, and that the possession thereof was taken from the defendant wrongfully, and the defendant was in the rightful possession of the same and is not now in the possession thereof; and the defendant having expressed his option to have judgment for the value of the said property and the costs in his suit, and the replevin bond is duly signed by Gus. Leisy & Co. as principals and Oswald Schmeid and David Santo as sureties—

Wherefore it is ordered and adjudged by this court that the judgment of the court below, the superior court at Keokux, Lee county, Iowa, be, and the same is, reversed, and the appellant and defendant, A. J. Hardin, constable and marshal, have and recover judgment against the appellees and plaintiffs and Oswald Schmeid and David Santo, sureties on the replevin bond, in the amount of five hundredand forty dollars ($540) and costs, and that execution issue therefor in favor of defendant, A. J. Hardin, constable, against the plaintiffs and sureties on the replevin bond for said amount, costs, and accruing costs, and that A. J. Hardin, constable and marshal, distribute the same in the following manner:

First, pay all charges and expenses, including his attorneys' fees in prosecuting this suit, and pay the remainder over to the treasurer of Lee county, Iowa, for the use and the benefit of the school fund of said county of Lee; to which judgment and finding appellees duly except. And it is further certified by this court, and hereby made a part of the record, that in the decision of this suit
35 there is drawn in question the validity of certain statutes of the State of Iowa, namely, chap. 6 of title 11 of the Code of Iowa of 1873 and the amendments thereto, on the ground of their being repugnant to and in contravention of sec. 8 of art. 1 of the Constitution of the United States, said appellees, Gus. Leisy & Co., claiming such statutes of the State of Iowa are invalid, and the decision in this cause is in favor of the validity of said statutes of the State of Iowa.

36 UNITED STATES OF AMERICA, }
State of Iowa, } ss:

I, G. B. Pray, clerk of the supreme court of the State of Iowa, do hereby certify that the above and foregoing is a full and complete

transcript of the entire record and proceedings in the cause of Gus. Leisy & Company, appellees, *v.* A. J. Hardin, appellant, as fully as same appears and remains of record and on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Des Moines, on this 16th day of October, A. D. 1889.

[Seal of the Supreme Court of Iowa.]

G. B. PRAY,
Cl'k Supreme Court.

37 In the Supreme Court of the United States. October Term, A. D. 1889.

GUS. LEISY & CO., Plaintiffs in Error,
vs.
A. J. HARDIN, Constable, Defendant in Error.

Assignment of Errors.

Afterwards, to wit, on the 3rd Monday of the October term, A. D. 1889, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Gus. Leisy & Company, by James C. Davis, their attorney, and say that in the record and proceedings aforesaid, to which this assignment of errors is attached, there is manifest error, to wit:

1. The supreme court of the State of Iowa erred in entering judgment in favor of the constitutionality of chapter 6 of title XI and the amendments thereto of the Code of 1873 of Iowa upon the findings of facts as made by the superior court of the city of Keokuk.

2. The supreme court of the State of Iowa erred in holding the sales of beer in sealed cases and kegs as made by said Leisy and Company unlawful.

3. The supreme court of the State of Iowa erred in not finding, upon the facts as found by the superior court of the city of Keokuk, the statutes of the State of Iowa in contravention of the Constitution of the United States.

38 4. The supreme court of the State of Iowa erred in not finding, upon the facts disclosed by the record, the statutes of the State of Iowa, as found in chap. 6, title 11, of Code of 1873 and amendments thereto, in contravention of the Constitution of the United States.

5. The supreme court of Iowa erred in not affirming the judgment of the superior court of the city of Keokuk.

6. The supreme court of Iowa erred in rendering a money judgment against plaintiff in error, the value of his interest in said property not being determined.

7. The supreme court of Iowa erred in rendering a money judgment against plaintiff in error, there being no authority in law for such judgment.

8. The supreme court of Iowa erred in rendering a distribution

of said money judgment, there being no authority under the statute of Iowa in the law for such distribution.

And the said Gus. Leisy & Company pray that the judgment and decision of the supreme court of the State of Iowa may be reversed, annulled, altogether held for naught, and that they may be restored to all that they have lost by occasion of said judgment in error.

JAMES C. DAVIS,
Attorney for Plaintiffs in Error.

[Endorsed :] Gus. Leisy & Company *vs.* A. J. Hardin, constable. Record.

Endorsed on cover: Iowa supreme court. No. 1459. Gus. Leisy & Company, plaintiffs in error, *vs.* A. J. Hardin. Filed October 21, 1889.

FILED
DEC 24 1889
JAMES F. MCKENNEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1889.

GUS LEISY & CO.,
Plaintiffs in Error,
vs.
A. J. HARDIN, Constable,
Defendant in Error.

Writ of Error to the Supreme Court of Iowa.

JAMES C. DAVIS, for Plaintiffs in Error.

H. SCOTT HOWELL and WILLIAM B. COLLINS,
for Defendant in Error.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

R. B. OGDEN & SON, PRINT, KEOKUK.

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1889.

GUS LEISY & CO., Plaintiffs in Error, vs. A. J. HARDIN, CONSTABLE, Defendant in Error.	WRIT OF ERROR TO THE SUPREME COURT OF IOWA.

JAMES C. DAVIS, for Plaintiffs in Error.

H. SCOTT HOWELL AND WILLIAM B. COLLINS, for Defendant in Error.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

STATEMENT OF FACTS.

This is an action commenced in the Superior court of Iowa at Keokuk, under the statutes of the state of Iowa, providing for the "Recovery of Specific Personal Property," which in terms provides when an action of replevin will lie.

Defendant in error appealed to the Supreme court of Iowa, and that court reversed the judgment of the Superior court, and entered final judgment against plaintiffs in error, giving defendant in error a money judgment for the value of the property seized, and in the event of collecting such judgment, providing for a distribution of same.

The statutes of Iowa, authorizing the original seizure by the constable, are found in chapter 6, title XI, of the Code of 1873, and amendments thereto. McClain's Ann. Code, sections 2359, 2431, commonly known as the "prohibitory liquor law," and the statutes authorizing the recovery of the property seized are found in chapter 1 of title XX, of the Code of '73. McClain's Ann. Code, sections 4455, 4474. The particular statutes of the prohibitory law complained of are as follows:

Section 1, Chap. 71, of the 22nd G. A., McClain's Ann. Code, sec. 2360: After this act takes effect no person shall manufacture for sale, sell, keep for sale, give away, exchange, barter, or dispense any intoxicating liquor for any purpose whatever, otherwise than as provided in this act.

Persons holding permits as herein provided shall be authorized to sell and dispense intoxicating liquors for *pharmaceutical and medicinal* purposes and *alcohol for specified chemical purposes* and wine for *sacramental purposes*, but *for no other purposes whatever*, and all permits must be procured as hereinafter provided from the district court of the proper county at any term thereof after this act takes effect, and a permit to buy and sell intoxicating liquors when so procured shall continue in force for

one year from date of its issue, unless revoked according to law or until application for renewal is disposed, if such application is made before the year expires.

Provided, That renewals of permits may be annually granted upon written application by permit holders who show to the satisfaction of the court or judge that they have during the preceding year complied with the provisions of this act, and to execute a new bond as in this act required to be originally given, but parties may appear and resist renewals the same as in applications for permits.

Section 2, Chap. 71, 22d G. A., McClain's Ann. Code, sec. 2362: Notice of an application for a permit or renewal thereof must be published for three consecutive weeks in a newspaper regularly published and printed in the English language, and of general circulation in the city or town where the applicant proposes to keep and sell intoxicating liquors, or if there be no newspaper regularly published in such city or town, such publication shall be made in one of the official papers of the county, the last of which publication shall not be less than ten days nor more than twenty days before the first day of the term, and state the name of the applicant, the purpose of the application, the particular location or the place where the applicant proposes to keep and sell liquors, and that the petition provided for in the next section will be on file in the clerk's office at least ten days before the first day of the term, naming it, when the application will be made, and a copy thereof shall be served personally on the county attorney in the same manner and time as required for service of original notices in the district court.

Section 3, Chap. 71, Acts 22d G. A., Section 2363, McClain's Ann. Code: Applications for permits shall be made by petition signed and sworn to by the applicant, and filed in the office of the clerk of the district court of

the proper county at least ten days before the first day of the term, which petition shall state the applicant's name, place of residence, in what business he is then engaged, and in what business he has been engaged for two years previous to filing petition, the place particularly describing it, where the business of buying and selling liquor is to be conducted, *that he is a citizen of the United States, and of the State of Iowa; that he is a registered pharmacist, and now is, and for the last six months has been lawfully conducting a pharmacy in the township or town wherein he proposes to sell intoxicating liquors under the permit applied for*, and as the proprietor of such pharmacy that he has not been adjudged guilty of violating the law relating to intoxicating liquors within the last two years next preceding his application, and is not the keeper of a hotel, eating house, saloon, restaurant, or place of public amusement; that he is not addicted to the use of intoxicating liquors as a beverage, and has not within the last two years next preceding his application been directly or indirectly engaged, employed or interested in the unlawful maaufacture, sale, or keeping for sale, of intoxicating liquors, and that he desires a permit to purchase, keep and sell such liquors for lawful purposes only.

Section 4, Chap. 71, 22d G. A., Section 2364, McClain's Ann. Code, provides for the giving of a bond as a condition of the issuing of the permit in the sum of $1,000, conditioned for the faithful observance of all conditions of the law, and the payment of all fines, damages, penalties or costs that may accrue under same.

Section 5, Chap. 71, 22d G. A., Section 2365, McClain's code. At least ten days before the first day of the term the applicant shall file with the clerk in support of the application, a petition signed by one-third of the freehold voters of the township, incorporated town, city or ward in which the permit is to be used, and each

person aforesaid shall sign said petition by his own true name and signature, and state that each, before signing same, has read said petition and understands the contents and meaning thereof *and is well and personally acquainted with the applicant, that the applicant is a resident of the county, is over* twenty-one years of age, is of good moral character, reputed to be law abiding, and has not been found guilty of violating the laws relating to intoxicating liquors in any proceeding at law or in equity within the last two years next preceding the date of his application as far as the petitioner has knowledge or information.

Such section further provides that the petition must state the applicant is worthy of confidence, and the permit sought to be issued is "necessary for the convenience and accommodation of the people of said locality."

Such section further provides that any person may file a remonstrance to the issuance of the permit on or before the first day of the term.

Section 6, Chap. 71, Acts 22d G. A., Section 2366, McClain's Ann. Code provides for a hearing on the petition, and resistance, if any there be, and among other things provides "the court shall not grant the permit until it shall first be made to appear by competent evidence that the applicant is possessed of the character and qualifications requisite, is worthy of confidence and to receive the trust and will be likely to execute the same with fidelity, *and that the statements made in his application and the petition* of residents are all and singular true."

Section 7, Chapter 71, Acts 22d G. A., Section 2367, McClain's Ann. Code, provides the form of an oath to be taken upon the issuance of a permit and the filing of a bond.

Section 8, Chap. 71, Acts 22d G. A., Section 2368, McClain's Ann. Code: Permits granted under this act shall be deemed trusts reposed in the recipients thereof *not as a matter of right but of confidence*, and may be revoked upon sufficient showing by order of the district court or judges thereof."

Such section further provides for a hearing upon a revocation of a permit.

There are several other sections of the law providing among other things for the keeping of a record of all permits issued by the clerk of the district court; for the issuance of authority to purchase by the county auditor to persons holding permits to sell.

That persons holding permits shall keep a record of all sales and shall only sell to persons with whom they are personally acquainted or who are properly identified.

And a provision for punishment by fine, imprisonment, liability for damages and penalties, for violations of any of the provisions of the chapter on intoxicating liquors or any of the amendments thereto.

The section of the Iowa statute providing for the form of judgment in an action for the recovery of specific personal property is found in section 3239 of Code of 1873. Section 4469, McClain's Ann. Code, which is as follows: "The judgment shall determine which party is entitled to the possession of the property and shall designate his right therein, and if such party have not the possession thereof shall also determine the values of the right of such party, which right shall be absolute as

to an adverse party having no right in such property and shall also award such damages to either party as he may be entitled to for illegal detention of such property."

ASSIGNMENT OF ERRORS.

In the rendition of the opinion and judgment, and the reversal of the judgment of the Superior court by the Supreme court of Iowa, error intervened to the prejudice of Gus Leisy & Co. as will appear from the record, and among said errors so intervening are the following, viz.:

1. Said Gus Leisy & Co., being residents and citizens of the City of Peoria and State of Illinois, engaged in the business of brewers, manufactured and produced beer in said City of Peoria and State of Illinois, same being put up in Peoria, Illinois, by said Gus Leisy & Co. in sealed barrels and cases, was by said Gus Leisy & Co., by means of railroads engaged in inter-state commerce, imported into Keokuk, Iowa, and by said Gus Leisy & Co., as citizens of Illinois sold and offered for sale from their warehouse in the State of Iowa in the original form and unbroken packages, as manufactured and put up by said Gus Leisy & Co. in Peoria, Illinois, and imported into the State of Iowa, and the Supreme court of Iowa held that such sales and offers to sell were prohibited by Chapter 6 of Title XI. of the Code of Iowa of 1873 and amendments thereto, and that such statutes of the State of Iowa were valid and not in contravention of Section 8 of Article I of the Constitution of the United States.

2. Said Gus Leisy & Co., being residents and citizens of the City of Peoria in the State of Illinois engaged in business at Peoria as brewers, manufactured and produced in said City of Peoria beer; same being put up in Peoria in sealed barrels and cases was by said Gus Leisy & Co. imported from Peoria, Illinois, to Keokuk, Iowa, in such sealed barrels and cases and by said Gus Leisy & Co. still being citizens of Illinois, was sold and offered for sale in Keokuk, Iowa, in the original and unbroken barrels and cases, as manufactured and put up in Peoria, Ill., and imported into the State of Iowa, and the Supreme court of Iowa held that such sales and offers to sell were prohibited by Chapter 6 of Title XI. of the Code of Iowa and amendments thereto, and that such statutes of the State of Iowa were valid, and not in contravention of Section 2 of Article IV. and Section I of Article XIV of the Constitution of the United States.

3. Said Supreme court of Iowa erred in holding that upon the facts as found in the findings made by the Superior court (record p. 13, 14) that chapter 71 of the Acts of the 22d G. A. of the State of Iowa, amendatory of Chapter 6, of Title XI., of the Code of 1873, of Iowa, was valid, and not in contravention of Section 8, of Article I, of the Constitution of the United States.

4. Said Supreme court of Iowa erred in holding that upon the facts as found in the finding of facts made by the Superior court, (record p. 13, 14) that Chapter 71 of the Acts of the 22d G. A. of the State of Iowa, amendatory of Chapter 6, of Title XI, of the Code of 1873, of Iowa, was valid and not in contravention of Sec 2, of Art. IV., and Sec. 1 of Art. XIV., of the Constitution of the United States.

5. That said Chapter 71 of the Acts of the 22d G. A. of the State of Iowa, was so construed as to prohibit all inter-state commerce in beer in the State of Iowa, and such construction held valid said statutes of the State of Iowa, and that same were not repugnant to and in contravention of Section 8, of Article I, of the Constitution of the United States, and in such holding the Supreme court of Iowa erred.

6. The Supreme court of Iowa erred in finding and adjudging that defendant in error was the owner of the property in controversy, such defendant in error having no right or title as owner in said property.

7. The Supreme court of Iowa erred in entering judgment in favor of defendant in error in the sum of $540.00, said defendant in error having no money interest in said property.

8. The Supreme court of Iowa erred in entering judgment that defendant in error should distribute the money recovered under the judgment so entered by paying all charges and expenses, including his attorneys' fees, and paying the remainder over to the treasurer of Lee county, Iowa, for the use and benefit of the school fund, there being no authority in law for such judgment.

9. The facts in this case being undisputed the Supreme court of Iowa erred in not affirming the judgment of the Superior court of the city of Keokuk, as entered upon said undisputed facts.

in bulk, we have failed to find any court holding the principles for which defendant's counsel have contended.

Mr. Chief Justice Taney, in his separate opinion in the license cases, (5 Howard, p. 577,) says: "But spirits and distilled liquors are universally admitted to be subjects of ownership and property, and are therefore subjects of exchange, barter and traffic *like any other commodity*, in which a right of property exists." And "Congress under its general power to regulate commerce with foreign nations may prescribe what article of merchandise shall be admitted and what excluded, and may therefore admit or not as it shall seem best, the importation of ardent spirits, and inasmuch as the laws of Congress authorize their importation, *no state has a right to prohibit their introduction.*"

In Lot vs. Hinson (8, Wall, page 150,) Mr. Justice Miller, in delivering the opinion of the court upon the right of a state to impose an unlimited tax upon spirituous liquors, says: "If this can be done in reference to *liquors*, it can be done with reference to *all the products* of a sister state, and in this mode one state can establish a system of non-intercourse in her commercial relations with all the other states of the Union."

In the recent case of Bowman vs. C. & N. W. R'y Co. (125 U. S. 465) where this court, in considering a section of the same law now under discussion, which was held unconstitutional, recognized beer in the *identical* form as held by plaintiffs in error, an article of commerce.

Mr. Justice Matthews, in delivering the majority opinion of the court, says, page 494: "If the State of Iowa may prohibit the importation of intoxicating liquors from all other states it may also include tobacco or any other article, the use or abuse of which it may deem deleterious. It may not choose even to be governed by considerations growing out of the health, comfort, or peace of the community. Its policy may be directed to other ends. It may choose to establish a system directed to the promotion and benefit of its own *agricultural manufacturies or arts of any description* and prevent the introduction and sale within its limits of *any or all* articles that it may select as coming into competition with those it seeks to protect."

Mr. Justice Field in his concurring opinion in the same case (125 U. S., p. 501) says: "What is an article of commerce is determinable by the usages of the commercial world, and does not depend upon the declarations of any state." * * * * If a state could thus take an article from commerce its power over inter-state commerce would be superior to that of Congress, where the Constitution has vested it."

In Monty vs. Arneson, (25 Iowa, 385) the Supreme court of Iowa, in passing upon the right to replevin intoxicating liquors, says: "The traffic in such liquors as an article of beverage is prohibited, but for other purposes it is recognized as an *article* of *commerce* as *other property*."

In the case of Connolly vs. Scarr, (72 Iowa, 224) decided at June term, 1887, the Supreme court of Iowa, in passing upon a contract of sale of liquors, says:

"That intoxicating liquors must be regarded as property which may be freely bought and sold, under the Constitution and the laws of the United States will be conceded."

See also Preston vs. Drew, 33 Maine, 558.

The authorities seem to be uniform that beer, or in fact intoxicating liquors of all kinds, when put up in the form and packages as recognized, and transported by the agencies of commerce, are considered and regarded in the same light as any other property engaged in commerce, and are entitled to the rights, privileges and protection accorded and guaranteed to the owners of such property under the provisions of the Constitution.

II.

EFFECT OF THE NON-ACTION OF CONGRESS.

In a proper presentation of this question as we view it, the argument of counsel for defendant in error, may in a measure have to be anticipated.

The power to regulate commerce among the several states is by the terms of the Constitution confided to congress. When a power or an authority is by the terms of the constitution vested in congress, the right to exercise that power rests wholly with congress to the exclusion of all state authority over it, and the silence or non-action of congress in respect to a power so confided to it, is equivalent to saying that the exercise of that power shall be free and untrammeled from any adverse legislation upon the part of the several states.

It will be conceded that congress has as yet enacted no legislation limiting or prescribing inter-state commerce in merchandise such as is in controversy, unless the legislation concerning common carriers may be of that character, and the purpose of that legislation is to facilitate rather than retard free commercial intercourse among the several states.

It must also be conceded that the traffic in intoxicating liquors, as sold in bulk, is one of national importance, and would admit of one uniform system or plan of regulation.

It may also be claimed without fear of contradiction that the same principles which apply to the regulation of foreign commerce by congress, apply with equal force to inter-state commerce.

This court has frequently and with great force and clearness, announced each of the foregoing propositions.

In Welton vs. State of Missouri (91 U. S., p. 279) in construing the clause of the Constitution, under consideration, it is said: "The power to regulate, conferred by that clause upon Congress, is one without limitation and to regulate commerce is to prescribe rules by which, it shall be governed; that is, the conditions upon which it shall be conducted, to determine how far it shall be free and untrammelled; * * * * And how far it shall be prohibited."

In Tieman vs. Rinker, (102 U. S., 127) the case of Welton vs. Mo., cited above is reviewed, and the court's approval of the doctrine therein announced, is as follows:

"The doctrine of this case has never been questioned. It has been uniformly recognized and approved, and expresses now the settled judgment of the court."

In Railroad Co. vs. Husen, (95 U. S., 469) it is said: "Whatever may be the power of a state over commerce that is completely internal, it can *no more* prohibit or regulate that which is *inter-state*, than it can that which is with foreign nations."

In County of Mobile vs. Kimball, (102 U. S., 697) in speaking of the non-action of Congress, under the clause of the Constitution under consideration it is said: "Its non-action in such cases with respect to any particular commodity or mode of transportation, is a declaration of its purpose that the commerce in that commodity or by that means of transportation shall be free."

In Brown vs. Houston, (114 U S., 631) it is said: "So long as Congress does not pass any law to regulate commerce among the several states, it thereby indicates its will that commerce shall be free and untrammeled, *and any regulation of the subject by the states is repugnant to such freedom.*"

In Walling v. State of Michigan, 116 U. S., 446, it is said:

"We have so often held that the power given to Congress to regulate commence with foreign nations, among the several states, and with the Indian tribes is exclusive in all matters which require or only admit of general and uniform rules, and especially as regards any impediment or restriction upon such commerce, that we

deem it necessary only to refer to our previous decisions on the subject, the most important of which are collected in Brown vs. Houston, 114 U. S., 631. * * * We have also repeatedly held that so long as Congress does not pass any law to regulate commerce among the several states, it thereby indicates its will that such commerce shall be free and untrammeled, *and that any regulation of the subject by the states except in matters of local concern only is repugnant to such freedom.*"

In same case it is further said: "In short, it may be laid down as the settled doctrine of this court at this day, that a state can no more regulate or impede commerce among the several states than it can regulate or impede commerce with foreign nations."

See also Wabash &c. Railway vs. Ills., 118 U. S., 573, cases cited.

In Robbins vs. Shelby, Taxing District, 120 U. S., 492, the following is laid down as the established doctrine of the Supreme court:

1.—"The Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several states, that power is *necessarily exclusive* whenever the subjects of it are national in their character, or admit only of one uniform system or plan of regulation." (See cases cited.)

2.—"Another established doctrine of this court is that when the power of Congress to regulate is exclusive, the failure of Congress to make *express regulations*, indi-

cates its will that the subject shall be left free from any restrictions or impositions, and *any regulation of the subject by the states*, except in matters of local concern only, as hereafter mentioned, is repugnant to such freedom." (See cases cited.)

In the very recent case of LeLoup vs. Port, of Mobile, decided May 14, 1888, 127 U.S., 640, 8th Supreme court, Rep. 1880, where a law of Alabama, taxing a telegraph company, which was engaged in sending messages between the several states, was held unconstitutional, the Supreme court upon a review of the authorities, says: "In our opinion such a construction of the Constitution leads to the conclusion that no state has the right to lay a tax on inter-state commerce in *any form*, * * * * and the reason is that such taxation is a burden on that commerce and amounts to a regulation of it, which belongs wholly to Congress." (See cases cited.)

See also:

Webber v. Va., 103 U. S., 344.

Asher vs. Texas, 9 Sup. Ct., Rep. 1.

Stoutenbourgh vs. Hennick, 9 Sup. Ct., Rep. 256.

As to commerce among the citizens in the several states, in intoxicating liquors in bulk, the same general regulations, that should apply to the state of Iowa, could equally apply to California, Louisiana, New York or Maine. Congress has not as yet made any such regulations, yet the State of Iowa, in enacting the statutes complained of, has usurped this power that is confided to Congress, and has gone to the extent of *absolutely prohibiting* any inter-state commerce within her borders so far as merchandise of this character is concerned.

The manufacture, production and commerce in malt liquors, as shown by statistics, is one of the largest and most valuable industries of this country.

Plaintiffs in error can take their beer in sealed barrels and cases as manufactured and put up by them in Illinois, and sell same in Missouri, Indiana or Minnesota; they are prohibited *under any circumstances* from making sales in Iowa. Is not the State of Iowa by this character of legislation going much further than a regulation, but is setting a precedent which if permitted to be established, gives the several States the power to absolutely *destroy* inter-state commerce.

In the light of the foregoing authorities the legislation complained of, clearly controvenes the terms of the Constitution. The Supreme court of Iowa has clearly recognized the principles herein contended for.

The city of Marshalltown passed an ordinance concerning peddling, which gave citizens of Marshall County, Iowa, certain commercial advantages over citizens of other states. The Supreme court of Iowa in City of Marshalltown vs. Blum, 58 Ia., 184., following the case of Welton vs. Mo. *supra*, held the ordinance unconstitutional, being in contravention of the Federal constitution.

To the same effect is the case of Town of Pacific Junction vs. Dyer, 64 Ia., 38., where the Supreme Court of Iowa say: "A law of Iowa discriminating against non-resident merchants of Iowa, would be in conflict with Art. I, Sec. 8 of the Constitution of the United States, which bestows upon Congress the power to regulate commerce between

the states." As will be hereinafter referred to, the law in question discriminates against non-residents of Iowa, and in favor of citizens of Iowa, by giving the citizens of Iowa exclusive commercial privileges in the commerce of vinous, spiritous and malt liquors. It is impossible upon principle to reconcile the opinions last above cited, with the opinion announced in this case by the Supreme Court of Iowa.

III.

THE EXTENT AND LIMIT OF THE POLICE POWER.

The authority to enact laws of the character of the statutes under discussion, is claimed to be found in the police power reserved to the several states. The determination of the limit and extent of this power, defining where the commercial power granted to Congress under the Constitution ends, and where the police power reserved to the several states begins, is the pivotal point upon which this case must turn.

It has been and will be contended on behalf of defendant in error, that the moment property crosses the boundary line of a state, it is within the complete control of the police power of such state, and is subject to any regulations or restrictions that such state may make concerning same.

If this be the true construction of the police power of the states, that power would be superior to and control the commercial power vested in Congress, and should a conflict arise, the police power would overwhelm and destroy the right of Congress to regulate commerce.

While in some cases it may be difficult to exactly determine the line of demarkation, where the commercial power vested in Congress ends and the police power of the states commences, yet in the case at bar the province of each of these powers is very easily determined.

So long as the property in controversy is held by the manufacturer or importer, in the original form and package in which it is imported into the state, it is within the protection of the Federal Constitution, an article of commerce. When the property is put into use, the packages broken, and it is intermingled with the other property of the state, then after such change takes place it is within the police power of the state, and subject to its control and regulation.

This distinction preserves inviolate the commercial and police powers, permits each one to perform its proper functions, and any other construction would allow one power to overwhelm and destroy the other.

A sealed case of beer, an unbroken barrel of beer, is in a form universally recognized as an article of commerce, it is in the form in which it is transported, imported, bought and sold, in the commercial world. So long as the case or barrel remains sealed or unbroken, it is no more hurtful, and no more threatens the health, morals or the lives of society than does a barrel of sugar or of flour.

So long as it remains in this sealed barrel or case in bulk, it is property, a recognized and important article of commerce, and as such should be protected.

If however the packages are broken open, sought to be sold by retail, or consumed in such way as to endanger society, then it is within the police power of the state, and society may be amply protected by proper legislative enactment, punishing the party selling parts of packages, or the person consuming such liquor to excess.

Liquors in bulk are not *per se* inimical to the public welfare. They are like infectious diseases, and decayed and unwholesome food, which may be combated upon the ground of self defense; but before they can be harmful in any degree, it requires some act upon the part of man, the breaking of a seal, the distributing by retail, the consumption to excess; and upon such acts, the police power has full control.

The scope, the limits and the extent of the police power seem to have been definitely established by the Supreme Court of the United States.

In Henderson vs. Mayor of New York, (92 U. S. page 271,) where this court was passing upon certain regulations, requiring the master of a vessel to list his passengers, and give bond that they will not become public charges, Mr. Justice Miller in delivering the opinion of the court referred to the Police power of the states as follows: "This power frequently referred to in the decisions of this court, has been in general terms somewhat loosely called the police power. * * * * What ever may be the extent and nature of that power, when not otherwise restricted, no definition of it, and no urgency for its use, can authorize a state to *exercise it in regard to a subject matter which has been exclusively confided to*

the discretion of Congress by the Constitution. Nothing is gained in the argument by calling it the police power. It must occur very often that the shading which marks the line between one class of legislation and another is very nice and not easily distinguishable."

"But however difficult this may be, it is clear from the nature of our complex form of government, that whenever the statutes of a state invade the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall or how closely allied to powers conceded to belong to the states." See also Peoples vs. Campaguine, Gen. T., 107 U. S., 60.

In Railroad Co. vs. Husen, (95 U. S., 468,) the state of Missouri attempted under the authority of the police power, to prohibit the introduction of Texas cattle within her borders during eight months of the year. The Supreme court in holding the statute unconstitutional says, in an opinion delivered by Mr. Justice Strong: "We are thus brought to the question whether the Missouri statute is a lawful exercise of the police power of the state. * * * * But whatever may be the nature and reach of the police power of a state, it cannot be exercised over a subject confided exclusively to Congress by the Federal Constitution. It cannot invade the domain of the National Government. Neither the unlimited powers of the State to tax, nor any of its large police powers can be exercised to such an extent, as to work a practical assumption of the powers properly conferred upon Congress by the Constitution. * * * * It may not under the cover of exerting its police powers, substantially

prohibit or burden either foreign or *inter-state commerce.* The police power of a state cannot obstruct foreign commerce or *inter-state commerce,* * * * * and as its range somtimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilently against any needless intrusion."

In Walling vs. Michigan (116 U. S., 446) at page 459, this court in an opinion by Mr. Justice Bradley, said:

"It is suggested by the learned judge who delivered the opinion of the Supreme court of Michigan in this case, that the tax imposed by the act of 1875 is an exercise by the legislature of Michigan of the police power of the state, for the discouragement of the use of intoxicating liquors and the preservation of the health and morals of the people. This would be a perfect justification of the act if it did not discriminate against the citizens and products of other states, and thus usurp one of the prerogatives of the national legislature. *The police power cannot be set up to control the inhibitions of the Federal Constitution or the powers of the United States Government created thereby.*"

In the late case of Bowman vs. Chicago R'y, where a portion of this identical law was held to be unconstitutional, (125 U. S., 465) in reviewing the decisions relative to the police power in regard to intoxicating liquors, Mr. Justice Matthews in delivering the majority opinion of the court, in speaking of the circumstances authorizing an exercise of that power, says on page 489: "And the fact must find its support in this, whether the prohibited article belongs to and is subject to be regulated as part

of foreign commerce or of commerce among the states. If from its nature its does not belong to commerce, or if its condition from putresence or other cause is such, when it is about to enter the state, that it no longer belongs to commerce, or in other words is not a commercial article, then the state may exclude its introduction, and as an incident to this power a state may use means to ascertain this fact. And here is the limit between the sovereign power of the state and the federal power. That is to say, that which does not belong to commerce, is within the jurisdiction of the police power of the state, *and that which does belong to commerce is within the jurisdiction of the United States.*"

If the states were allowed to designate what should and should not be regulated, the opinion says on page 490: "Upon this theory the power to regulate, instead of being paramount over the subject would become subordinate to the state police power. * * * * The police power would not only be a formidable rival but in a struggle must necessarily triumph over the commercial, as the power to regulate is dependant upon the power to fix and determine upon the subjects to be regulated. * * * * But whatever may be the nature and reach of the police power of a state, it cannot be exercised over a subject confided exclusively to Congress by the Federal Constitution. * * * * It cannot without the consent of Congress, express or implied, regulate commerce between its people and those of the other states of the Union in order to effect its end, *however desirable such a regulation might be.*"

See also Wabash R'y vs. Ill., 118 U. S., 557, 572.

The concuring opinion of Mr. Justice Field in the Bowman case ably and conclusively reconciles any seeming conflict between the police and commercial powers.

A review of the authorities above referred to, together with the cases therein cited and discussed, defines with comparative accuracy the extent of the police power of the several states, and establishes the very wise and wholesome doctrines that this power cannot be used to burden, restrict, regulate, or prohibit free commercial intercourse among the several states, and that the states have no more authority and control over commerce among the several states, than they have over commerce with foreign nations.

IV.

THE MEANING AND EXTENT OF THE WORD "COMMERCE" AS USED IN THE CONSTITUTION.

The Bowman case (121 U. S., 465,) as we construe it, decides every question involved in this controversy, except the meaning of the word commerce, as used in the clause of the Constitution now being discussed; that is whether or not commerce, in addition to conferring the right of importation, confers upon the importer the right to sell.

In that case it was held that beer in the identical form, in which it is in this case, was an article of commerce, and the provision of the Iowa law, prohibiting its importation into the state, was held unconstitutional and void.

Plaintiffs in error therefore under the doctrine of this case, and it is certainly a doctrine necessary and essential for the proper preservation of commercial relations and commercial prosperity of the several states, had the right to import the beer in question into Iowa. Having the right to bring this merchandise into Iowa, does the right stop when the act of transportation ceases? does commerce in the sense it is used in the Constitution merely give the valueless and barren right of transportation, a right when viewed in a commercial sense, of no value, or does commerce as used in the Constitution mean just what this court has so often held that it does mean, trade, traffic, barter and sale?

It is unnecessary to call the court's attention to the magnitude of the commerce between the several states or the reason why that commerce should be free and untrammeled, unless the regulations of it are uniform, applying under similar conditions to all of the states alike.

No clause in the Constitution is more essential to our national prosperity, and upon its original adoption no clause was more earnestly debated by the representatives of the various states, before they would consent to delegate this power to the Federal government. But having delegated the power, it is the duty of the courts to guard it with jealous care, and at every step, prevent the states from exercising in any particular, a power which they have delegated to Congress.

The definition of commerce, and its regulation by Congress, as announced by Chief Justice Marshall in the case of Gibbons vs. Ogden, 9 Wheaten, 7, 8, 9, for clearness and perspicuity is unsurpassed. He says: "But

in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several states. It would be a very useless power, if it could not pass those lines. The commerce of the United States with foreign nations is that of the whole United States. Every district has a right to participate in it. * * * If Congress has the power to regulate it, that power must be exercised wherever the subject exists. * * * *This principle is, if possible, still more clear when applied to* 'commerce among the several states.' * * * What is commerce among them and how is it to be conducted? Can a trading expedition between two adjoining states commence and terminate outside of each? * * * *Commerce among the states must of necessity be commerce within the states.* * * * The power of Congress, then, whatever it may be, must be exercised *within the territorial jurisdiction* of the several states. * * * We have now arrived at the inquiry, what is that power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others, is complete in itself; may be exercised *to its utmost extent*, and acknowledges *no limitations* other than are prescribed in the Constitution. * * * If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, *is vested in Congress as absolutely as it would be in a single government*, having in its Constitution the same restrictions in the exercise of the power as are found in the Constitution of the United States."

Language as the above, which has uniformly re-

ceived the endorsement of the Supreme court in subsequent decisions, clearly refutes the contention by counsel for defendant, that the power of Congress terminates when the article is within the territorial limits of the state.

The case of Brown vs. Maryland, 12 Wheaten, 447, squarely decides the propositions for which we are contending, and while some judges have essayed slight criticisms of that case, yet the recent and unqualified endorsement received by it, from this court, give it all the binding force of an unquestioned decision.

Chief Justice Marshall in speaking of the power of commerce on page 447, says: "If this power reaches the interior of a state, and may be there exercised, it must be capable of *authorizing the sale* of *those articles*, which it imports. Commerce is intercourse; one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point where its *continuance is indispensable to its value.*."

"To what purpose should the power to allow importation be given, unaccompanied with the power to *authorize a sale of the thing imported.*"

"*Sale is the object of importation*, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing then as importation itself. *It must be considered as a component part of the power to regulate commerce.* Congress has

a right not only to authorize importation but to authorize the *importer to sell.*"

"It may be proper to add, that we suppose the principles laid down in this case to *apply equally to importations from a sister state.*"

The case of Bowman vs. Chicago &c. Ry. 125 U. S. page 465, *supra*, has to our mind a controlling influence upon the case at bar. While the facts of that case are, undoubtedly familiar to the court, it is important to note that Bowman alleged as his ground for damage, that he had bought his 5000 barrels of beer for $6.00 per barrel, and could sell same in Iowa for $8.00 per barrel. Unless the right to import carried with it the right to sell, he certainly would not have been entitled to any damages.

This court in that case held one of the sections of this identical law unconstitutional, and upon a state of facts, and for reasons that lead to the inevitable conclusion, that it is also unconstitutional in the respect for which we contend.

Brown vs. Maryland, is cited approvingly by a majority of the court, receiving as we claim, an unqualified endorsement. Mr. Justice Mathews, speaking for the majority, says on page 490. "It is easier to think that the right of importation from abroad, and of transportation from one state to another, includes by necessary implication, the right of the importer to sell in unbroken packages, at the place where the transit terminates, for the very purpose and motive of that branch of commerce which consists in transportation, *is that other*

and consequent act of commerce which consists in the sale and exchange of the commodities transported. Such indeed was the point decided in case of Brown vs. Maryland."

Mr. Justice Field in his concurring opinion in the same case, at page 504 says: "*That the right of importation carries with it the right to sell the article imported, does not appear to me doubtful.*"

In LeLoup vs. Port of Mobile, 8th Supreme Court Reporter, 1383, announced May 14, 1888, Mr. Justice Bradley, speaking for a unanimous court, says of Brown vs. Maryland: "*That case was decided 1827, and the decision has always been regarded and followed as the true construction of the clause of the Constitution now in question.* * * * The opinion of the court delivered by Chief Justice Marshall shows that the case was carefully and fully considered by the court."

As to whether or not a man who transports merchandise from one state to another for the purpose of sale, is an importer, is not to our minds important. The question is, is he engaged in inter-state commerce? Yet the authorities in considering this question, term such transactions importations. In the Bowman case as to inter-state commerce, the words transport and import are used as synonymous terms.

In Woodruff vs. Parham, 8 Wall, page 132, Mr. Justice Miller, in an opinion for the court, in speaking of the word import, says: "But the word is susceptible of being applied to articles introduced from one state to another."

In Robbins vs. Shelby, Taxing District, 120 U. S., 497, this court says: "The negotiation of sale of goods, which are in another state, for the purpose of introducing them into the state in which the sale is made is inter-state commerce."

Under the decision in the Bowman case, intoxicating liquors may be introduced into the state as an article of commerce; the right to so introduce, unless it carried with it the right to sell, would undoubtedly be a barren right.

If the states can absolutely prohibit the sales of any article of merchandise, which they see fit, commerce in its true sense, would be deprived of its most important adjunct, and the free interchange of commodities between the states would be at an end.

The language of the Constitution, as expounded by the decisions of this court, as well as the sound reason of the proposition, certainly justifies a court in finding that the right of importation from one state to another, carries with it the right to sell, free from such burdens or prohibitions on the part of the state as amount to a regulation of commerce.

V.

The authorities cited in Sections 2 and 3 hereof, settle it beyond question that the same principles as to the exclusive right in congress to regulate commerce apply equally to foreign and inter-state commerce. The power is given in the same section of the Constitution in the same language and must be held to be identical.

If the court will pardon a repetition as to what was said in Brown vs. Houston (114 U. S., 631) *supra*. "In short it may be laid down as the settled doctrine of this court at this day, that a state can no more regulate or impede commerce among the several states than it can regulate or impede commerce with foreign nations."

If a State cannot prohibit the sale of importations from abroad, then it cannot prohibit sales of similar articles when brought from sister states. Otherwise the products of England, Germany and France would have better rights and more advantages than similar products from California, Kentucky or Illinois, a state of affairs that was certainly never intended at the time of the adoption of our Constitution, and which would be directly opposed to the well-established policy of giving a preference to the products of our own country.

The State of Iowa for an unbroken period of 32 years, recognized the fact, by its legislature and judiciary, that it had no powers to prohibit the sales of intoxicating liquors imported from abroad.

In Chap. 45 of the Acts of the 5th G. A., approved January 22d, 1855, being the first prohibitory law of the State, Sec. 2 was as follows:

"Sec. 2. Nothing in this act shall be construed to forbid the sale by the importer thereof, of foreign intoxicating liquors imported under the authority of the laws of the United States, regarding the importation of such liquors and in accordance with such laws, provided that the said liquors at the time of sale by said importer re-

mains in the original casks and packages in which it was by him imported," etc.

That Section appeared as Section 1560 of the Revision of 1860, and 1524 of the Code of 1873, and was not repealed until the 22d G. A., which session was held in 1888. And the Supreme Court of Iowa as late as the June term, 1887, in Pearson et al. vs. The International Distillery, (72 Ia., 348,) in an opinion by Judge Beck on page 354, in speaking of this section says:

"The provisions to this effect are necessary in order to harmonize with section 1524, which is intended to *conform the statutes to the doctrine of the United States Supreme Court*, announced in Brown vs. Maryland, 12 Wheaton, 419. * * * So that the statute would not be in conflict with *the laws and authority of the United States*."

This case further holds that imported liquors might be lawfully sold.

While it is true the legislature at its last session repealed this section, no one will contend that this repeal can alter the principles which led to its adoption, and if the law without that provision would have been unconstitutional as to sales of imported liquors, so it is now unconstitutional when it prohibits similar sales of articles imported from other states in the Union.

The same doctrine is recognized in Maine, State vs. Robison, 49 Me., 285.

The mere fact that an import duty is paid cannot give foreign articles a preference over home manufac-

turies. The import duty is for the purpose of raising revenue, and simply takes the place of taxes levied on our home products. It gives such articles no peculiar advantages as articles of commerce. If congress should remove this import duty, that surely would not authorize the states to make any regulations of or lay any burdens on foreign commerce.

VI.

It is claimed that the power to prohibit and the taxing power is identical, and that if the doctrine contended for is correct, large quantities of merchandise might be imported into the states, and while held in original packages would thus escape all municipal and state taxation. This is not true, nor in accordance with the decisions of this court. While this court has held that inter-state commerce as inter-state commerce cannot be taxed, it has never held that the property engaged in such commerce may not be subject to reasonable state or municipal taxes.

In Gibbons vs. Ogden, 9 Wheaton, 200; it was said: "There is no analogy then between the power of taxation and the power of regulating commerce."

See also Hinsen vs. Lott, 8 Wall, 150.

In LeLoup vs. Port of Mobile, 127 U. S., 640, 8. Supreme Court, Rep., page 1384, it is said: "We may here repeat what we have so often said before, that this exemption of inter-state and foreign commerce from state regulations does not prevent the state from taxing the property of those engaged in such commerce, located

within the state as the property of other citizens is taxed."

VII.

EFFECT OF THE IOWA LAW.

The statutes of Iowa by their very terms absolutely and specifically *prohibit* residents and citizens of states other than Iowa from engaging in commerce in liquors in Iowa for any purposes whatever.

Section 1 of the act (pages 4, 5 of this brief) limits the sales by permit holders to "pharmaceutical and medicinal" purposes.

Sec. 3 (page 5, 6 of this brief) provides that the application for a permit must state that the party applying "Is a citizen of the United States *and the State of Iowa*; is a registered pharmacist, and now is and for the last six months has been lawfully conducting a pharmacy in the township or town wherein he proposes to sell intoxicating liquors under the permit applied for."

Section 5 (page 6, 7 of this brief) provides that the party applying for a permit must file in aid of his application a petition signed by one-third of the free holders of his ward, stating among other things "that the applicant is a resident of the county * * * and that the permit prayed for is necessary for the convenience and accommodation of the people of said locality, and that they believe the applicant is worthy of confidence."

Section 6, (page 7 of this brief,) provides that "No application for a permit or renewal thereof shall be considered or acted upon by the court until the requisite notice has been given, and petitions filed as pro-

vided by this act, and each is in form and substance such as required."

Section 8, (page 8 of this brief,) provides that "Permits granted under this act shall be deemed trusts reposed in the recipients thereof, not as a matter of right but of confidence, and may be revoked upon sufficient showing by order of the court or judge thereof."

In construing statutes it was said by this court in Henderson et al vs. Mayor of New York et al, (92 U.S., p. 268): "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect."

The purpose and effect of these statutes is to utterly destroy and prohibit all foreign and inter-state commerce in liquors.

Plaintiffs in error as citizens of Illinois are by the very terms of the statutes excluded from the monopolized privileges accorded above to pharmacists, for such statutes require that *they must be citizens of Iowa, and registered pharmacists in the County for six months prior to making the application.*

So far as plaintiffs in error are concerned the prohibition as to them is absolute.

Inter-state and foreign commerce in liquors so fully recognized in many of the decisions heretofore cited, is by the Iowa statutes prohibited and destroyed.

The opinion of the Supreme Court of Iowa simply follows the case of Collins vs. Hills, 41 N. W. R., 571.

And while in that case, substantially all of the authorities now presented were before the court, the court

without attempting to explain or distinguish them, absolutely holds that liquors cannot be sold in the State of Iowa under any circumstances other than as is provided for in the statutes complained of.

The evils of laws of this character are found in the dressed beef laws recently passed in Indiana and Minnesota, which prohibit the importation and sale of dressed beef imported from other states, and which have been held unconstitutional by the Circuit courts of the United States and the District court of the State of Indiana.

Swift vs. Sutphin, 39 Fed. Rep., 630.

In re. Christian, 39 Fed. Rep., 636.

In re. Barber, 39 Fed. Rep., 641.

A precedent once established as to *any* one article of commerce, would lead to retaliatory and protective legislation, which would at once impair and eventually destroy, the friendly relations and the commercial prosperity of the several states.

It is respectfully submitted upon this branch of the case, that the State of Iowa in enacting the legislation complained of, has invaded the rights exclusively confided to Congress and that such legislation, prohibiting as it does all commerce among the several states in recognized articles of commerce, is in contravention of Sec. 8, of Artlcle I, of the Constitution of the United States, and is void.

VIII.

The statutes of Iowa herein complained of and heretofore referred to, by *granting* to citizens of the State of Iowa,

the *exclusive* right to engage in commerce in liquors, and *excluding* the citizens of every other State from engaging in such commerce, have granted to the citizens of Iowa "privileges and immunities," which are not accorded to the citizens of other states, and such state of Iowa, in enacting and enforcing such laws "abridges the privileges and immunities of citizens of the United States," and such legislation is in contravention of Sec. 2, of Article IV., and Sec. 1, of Article XIV of the Federal Constitution.

IX.

JUDGMENT OF THE SUPREME COURT OF IOWA.

The only right of defendant in error to the property in question was under and by virtue of a search warrant issued under the provisions of Section 1544 of the Code of 1873, McClains Ann. Code, Section 2401, which is as follows: "If any credible resident of any county, shall before a justice of the peace for the same county make written information, supported by his oath or affirmation, that he has reason to believe and does believe, that any intoxicating liquor described as particularly as may be in said information is in said county, in any place described as particularly as may be in said information, owned or kept by any person named or described in said information as particularly as may be, and is intended by him to be sold in violation of this chapter, said justice shall upon finding probable cause for such information, issue his warrant of search, directed to any peace officer in said county, describing as particularly as may be, the liquor and the place described in said information, and the person named or described in said information as the owner or keeper of

said liquor and commanding the officer to search thoroughly said place and to seize said liquor with the vessels containing it, and to keep the same securely, until final action be had thereon, whereupon the said peace officer to whom such warrant shall be delivered, shall forthwith obey and execute, so far as he shall be able, the commands of said warrant, and make returns of his doings to said justice and shall securely keep all liquors so seized by him and the vessels containing it, until final action be had thereon."

In the event that liquors seized under the foregoing section are declared forfeited, the right of the officer to same is found under Section 1547 of Code of '73, McClains Ann. Code, Section 2404, which is as follows: "Whenever it shall be finally decided that liquor seized as aforesaid is forfeited, the court rendering final judgment of forfeiture shall issue to the officer having said liquors in custody, or to some other peace officer a written order directing him forthwith to destroy said liquor and vessels containing the same and immediately thereafter to make return of said order to the court whence issued with his doings indorsed thereon and sworn to;" the balance of the section refers to action of officer in case liquors are not forfeited.

The form of judgment in favor of the prevailing party in a suit for recovery of specific personal property is found in Section 3239, Code of '73, McClains Ann. Code, Sec. 4469, which is as follows: "The judgment shall determine which party is entitled to the posssession of the property, and shall designate his right therein, and if such party have not the possession thereof, shall

also *determine* the *value* of the right of such party which right shall be absolute as to an adverse party having no right in such property and shall also award such damages to either party as he may be entitled to for illegal detention of such property."

The foregoing are all the sections of the Iowa law in any manner authorizing the judgment entered by the Supreme Court of Iowa.

Under the authority of those sections, a very remarkable judgment was entered; it provides (see record page 19.)

1. *That defendant in error is the owner of the property in controversy.*

2. That defendant in error is entitled at his option to a money judgment rather than a return of the property.

3. A money judgment for the full value of the property is rendered in favor of defendant in error.

4. *A distribution of such money judgment is provided for.*

We contend that each one of the foregoing provisions of said judgment is absolutely without warrant or authority.

The defendant in error was not in any sense the owner of the property; at most he was only entitled to

the possession of same to *destroy* it; that right certainly has no money value—and the provision for distributing the judgment when collected, is a clear attempt of the judiciary to usurp the powers of the legislature.

We submit that the judgment as rendered, was without warrant or authority.

X.

The right to replevin intoxicating liquors upon the ground of the unconstitutionality of the law under which they were seized is found in Section 3225 of Code of '73, McClains Ann. Code, 4455, which provides: "An action for the recovery of specific personal property may be brought in any county in which the property or some part thereof is situated, the petition must be verified and state:

1. A description of the property.

2. Its value.

3. The facts upon which plaintiffs right to same exists.

4. "That it was neither taken on the order or judgment of a court against him, nor under an execution or attachment against him or against the property. But if it was taken by either of these modes, then it must state the facts constituting an exemption from seizure by such process."

5. The cause of detention.

6. The amount of damages for detention.

The right to institute an action, such as plaintiff commenced, was recognized and approved in:

Cooley vs. Davis, 34 Ia., 128.

Armel vs. Lendrum, 47 Ia., 537.

Davis vs. Gambert, 57 Ia., 239.

Sullivan vs. Stephenson, 62 Ills., 297.

Wells on Replevin, Section 253, page 143.

It is respectfully submitted, that the judgment and decision of the Supreme Court of Iowa should be reversed, and the finding and judgment of the Superior Court of the City of Keokuk should be affirmed,

JAMES C. DAVIS,

For Plaintiffs in Error.

Office Supreme Court U. S.
FILED.
DEC 24 1889
JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of United States.

OCTOBER TERM, 1889.

GUS LEISEY & CO.,
Plaintiffs in Error,

v.

A. J. HARDIN, *Constable,*
Defendant in Error.

Writ of Error to the Supreme Court of Iowa.

JAMES C. DAVIS, *for Plaintiffs in Error.*

H. SCOTT HOWELL and WILLIAM B. COLLINS, *for Defendant in Error.*

ARGUMENT OF JOHN Y. STONE, ATTORNEY-GENERAL OF IOWA, IN SUPPORT OF THE STATE LAW.

THE plaintiffs in error, manufacturers, dealers, and residents of another State, shipped therefrom to Keokuk, Iowa, intoxicating liquors in different kinds of sealed packages, which were stored in a warehouse controlled by them in that city. These packages were transported to this State by rail, and after arrival were held and offered by the owners for sale contrary to the prohibitory law of the State of Iowa. Their counsel claims that this law is unconstitutional as being in conflict with the provision that Congress shall have power to regulate commerce among the States. At the request of the Governor of the State, I respectfully ask permission to submit a short argument in support of the State law. Counsel for the defendant in error will, without doubt, cite the authorities, and so I content myself with presenting the following views:

Courts will construe constitutional provisions in their asserted application to specific subjects as they construe statutes; and if such provisions ought not, and in reason do not, affect such subjects, the courts will so decide. It will not be assumed that the provision of the Federal Constitution for the regulation of commerce among the States was intended to permit the destruction of domestic order, health or safety in the States, as the people of these States might reasonably view these subjects to be susceptible of being destroyed. It will not be assumed that the founders of the constitution and those who amended it intended that this provision might neutralize and destroy reasonable State regulations which the people in the forms of organized State action had established to conserve order, health and safety. It will not be assumed that this provision was intended to be in conflict with a reasonable State police regulation. The perversion of the use, and the unskillful manipulation and control of certain articles and commodities which are articles of commerce, may result in danger to the subjects of the regulation which it was the object of the people who established them to prevent. If the objects of such

regulation and the methods of effecting them shall appear reasonable, then the court will not hold that the constitutional provision was intended to thwart or override it. There would then be no conflict between the purpose of the constitutional provision and the purpose of the regulation. The perversion of the use of intoxicating liquors may be injurious to health, safety and domestic order. The perversion of the use of certain poisons, and the manipulation and management of them may be injurious. The unskillful or ignorant management of certain concentrated explosives may render them highly dangerous. Yet these articles are all articles of commerce. Can it be maintained that it was the object of the constitutional provision in question to prevent a reasonable regulation made by the people of a State in pursuance of reserved powers, or of police powers, to prevent the perils which such perversion and unskillful and ignorant management may bring upon the inhabitants? The articles of commerce which are thus the subject of regulation may all be useful when proper restrictions are thrown about them to prevent their being dangerous. A car-load of dynamite in original packages, transported from another State, and standing on a track in a populous city, threatens the lives and property of all within a radius of many rods about it. Will it be contended that a State law, or an ordinance of the city which provided for its being taken to a remote locality where it would cease to threaten, was in violation of the constitution as being a restriction upon commerce? Yet, it would be a restriction. To the extent that such a regulation interfered with the free right of the owner to dispose of it, such a regulation would be a trammel upon commerce. Yet the dynamite properly handled and intelligently managed might be of much use when applied to many mechanical operations. Suppose a transporter of concentrated poisons in original packages from another State should offer to sell them indiscriminately to persons who did not know their uses, or had not the special knowledge to intelligently

and safely employ them, would it be contended that a State law, or a city regulation, which provided for safe methods of dispensing them was in violation of the constitutional provision as being a restraint upon commerce? Yet such regulations to the extent that they interfered with the free will of the transporter in disposing of the articles would be a restraint upon commercial freedom.

Intoxicating liquors and concentrated explosives and poisons, though articles of inter-State commerce if coming from another State in original packages, may all threaten or destroy public order, health, safety, and even life, if not placed under intelligent regulation and control. Was it the intention of the authors of the constitution that such perils might not be guarded against and prevented by the people exposed to them? Is it not a safer and more reasonable construction to hold, and is it not more in accord with the probable purposes of the provision that the inter-State clause, and the reasonable State regulation theory, as to articles of commerce susceptible of producing these dangers, may go hand in hand and neither be any encroachment upon the other? Thus the high purposes of the Federal provision, and the just and wise objects of the State regulation would both be effectuated.

The time when the State can thus exert its power over the transported article is the instant after its arrival, when it first threatens the objects which it was the purpose of the State law to protect. In the case of intoxicating liquors, it is upon the instant of their arrival in the State, with the intent on the part of the owner or transporter to sell them therein in violation of the State law. From that instant they are a menace to the law and to the objects sought to be subserved by it, whether they are in the original packages or not. From that instant they are within the jurisdiction and amenable to the power whose law they threaten.

It is not unlikely that in the discoveries of science and the growth of the arts, other articles more concentrated and more dan-

gerous than any now known may appear in our commerce and in the public necessities call for more severe and exacting regulation than any articles now in use demand. Can it be contended that the public safety shall be placed in still greater jeopardy, and that no power exists in the people for self-protection? Was it the intention of the fathers that an iron Juggernaut named Commerce should be driven at will over a prostrate and powerless people?

It may be urged that the people of a State might interdict useful articles which came in competition with those of their own production. But did the founders believe they would more likely do this than that a non-resident transporter would send to their shores from interested motives, articles dangerous to their civilization, and was it the intention of the founders to give to the latter a clear right of way for his traffic, and repress the former in their efforts to maintain social order? A small community in a great nation that would erect barriers against the advancing civilization around it, would soon perish, and it does not seem possible that the fathers would fear that a people would invite their own destruction. It rather seems to be more in consonance with our views of the wisdom of the statesman who made the constitution, to believe that they had in view the great future of their country, and the wisdom and justice of the coming generations in their efforts in local self-government and their loyalty and devotion to their common country.

In the view here presented, it would always remain for the court to determine the reasonableness of the regulation in question. In every given case, the court, having in view the special character of the article on which the restriction was placed, would always balance the merits of the contending principles, should a point of conflict ever be reached, and draw the line between them where reason had marked it. It may be that this is conceding too much, and that the people through their law-making power are the sole judges

of the question as to what is detrimental to their local interests in the exercise of their power of police regulation.

It is well worthy of consideration whether the founders did not believe, and whether they did not mean by the commerce provision, that the people of a State whose highest interests were at stake could be safely entrusted with the decision of what was destructive to their peace, order, safety, prosperity and happiness.

But it should be noted that in this case the articles of liquor seized, though in what are designated "*original packages*," were at the time no longer articles of inter-State commerce. They were stored in our State in a warehouse belonging to or controlled by the owners, as part of a trade stock for sale. There attached to them at that time none of the incidents of inter State commerce. If the owners had sold them before shipment, or in transit, or after arrival and storage, would the purchaser who at the time held them for sale in violation of the State statute, have inherited or had transferred to him any constitutional right to violate the law of the sovereignty where the articles were held? If so when, if ever, would this right cease in any subsequent purchaser? In how remote a degree of transfer would the article and its owner be amenable to the State law? If any subsequent purchaser could not violate the law with impunity, by what magic could the non-resident transporter be invested with this right? Is the right to sell the interdicted commodity of so high a character, in national necessity, that the wise and patriotic authors of the constitution intended, in the inter-State commerce provision, that it should override the will of the people, as expressed in their local government, and strike down the barriers they had raised against a menace to their welfare?

Respectfully submitted,

JNO Y. STONE.

Attorney-general.

FILED
DEC 21 1889
JAMES H. MCKENNEY
CLERK

IN THE

Supreme Court United States.

OCTOBER TERM, 1889.

No. 1459.

GUS LEISEY & Co., *Plaintiffs in Error*,

vs.

A. J. HARDIN, Constable, *Defendant in Error*.

ON ERROR FROM SUPREME COURT OF IOWA.

J. C. DAVIS, for Plaintiffs in Error.

W. B. COLLINS AND H. SCOTT HOWELL, for Defendant in Error.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

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BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT OF FACTS.

The facts of this case are few and undisputed. The law as applied to them, is of the utmost importance, involving as it does, the rights of commerce, the rights of states, and the well being of society. The particular class of property in controversy—intoxicating liquors—has been the subject of more legislation and litigation, than almost any other. The gigantic power which the liquor traffic has achieved in this land for evil, corrupting politics, debasing morals, increasing pauperism and crime, and entailing wretchedness and ruin, is known to all; and has more than once, received judicial consideration at the hands of this court.

Not as a new question, but in a more direct way, does it now come before the court for final adjudication, in this action.

There is a full and correct statement of the facts presented in the decision of the Supreme Court of Iowa as published in 43 Northwestern Report, page 188, and found in the record of this case, pages 18, 19, 20.

Briefly stated, they are these : Plaintiffs in error, a firm composed of citizens of Illinois, who formerly lived in Keokuk, Iowa, now residing at Peoria, Illlnois, manufactured in that city, beer, and shipped it in sealed kegs and bottles, by railroad, to their agent, John Leisey, for sale in Keokuk, Iowa. The said agent received the beer at the railroad depot in Keokuk, Iowa, and hauled it out by teams to the brewery warehouse in Keokuk, described in the warrant of seizure, which house is owned by Christine Leisey, one of the plaintiffs in error ; and from that place, they sold and delivered said beer, at retail, in the same unbroken kegs and cases, called "original packages," in which same were received.

They sold it to any and everybody, save to minors and drunkards, who wanted it, and did not know, or ask or care, for what purpose the parties bought the beer.

This is the kind of business which plaintiffs have been doing in Keokuk, ever since 1884. And the judge who made a special finding of facts in this case, very correctly found "that said intoxicating liquors, seized by defendant in his official capacity as constable were kept for sale in the premises described in the search warrant, in Keokuk, Lee County, Iowa, and occupied by Gus. Leisy & Co. for the purpose of being sold, in violation of the provisions of the law of Iowa. * * * " See record, page 14. And there was no pretense that the beer was being kept or sold, for the purposes, or by any person, authorized by the law of the state to sell it.

On the 30th of June, 1888, upon a search warrant, duly issued from a justice of the peace of Lee County, Iowa, in a criminal proceeding, directing the defendant in error,

a constable, etc., to search the premises described therein; being the same premises described in plaintiffs petition in replevin, and to seize any intoxicating liquors found therein, the defendant in error seized in said premises, 293 kegs, and 11 cases of bottled beer, stated by plaintiffs, in their verified petition, and acknowledged by defendant, in his verified answer, to be of the value of $540.90; and on the 2nd day of July, 1888, the plaintiffs filed their bond and petition in replevin, and took said beer from the said defendant, *and have since sold and disposed of the same*, as appears by the testimony of John Leisey, the witness of plaintiffs. Record, pages 8, 9, 10.

A jury was waived by all parties, and the court made a written finding of facts, and conclusions of law, which are set out in full in the record, pages 13, 14.

The judge of the Superior Court of Keokuk, Iowa, who first tried the case, found the sales which had been made for years before, and which were being made, in Keokuk, Iowa, by the plaintiffs at the time of the seizure, as above set forth, to-wit; in "original packages," were lawful — that the Statute of Iowa, which, it was conceded, forbids such sales, was unconstitutional and void; and he rendered judgment for plaintiffs, giving them the beer, and assessing damages and costs against defendant in said action.

The supreme court, of Iowa, reversed this decision of the superior court, of Keokuk, and held the prohibitory law of Iowa to be constitutional, and rendered judgment in favor of Hardin, constable, for the value of the beer as stated in the plaintiffs verified petition; and now Gus. Leisy & Co., plaintiffs, bring the case to this court on substantially two assignments of error—to-wit:

FIRST AND CHIEFLY. That the provision of the law of Iowa, limiting and regulating, the sale of intoxicating liquors, is unconstitutional and void, because it is in contravention of the commercial clause of the constitution of the United States, Section 8, Article 1, which says: "Congress shall have power to regulate commerce between the states," and that it is also in contravention of Section 2, Article 4,

which says: "The citizens of each state shall be entitled to all the privilege and immunities of citizens of the several states," and, also, of the fourteenth amendment to the Constition, which prohibits the states from passing any law, abridging the rights of the citizens of the United States.

SECOND. That the supreme court of Iowa erred in rendering a money judgment against the plaintiffs in error for the value of the beer seized in this case.

ARGUMENT AND AUTHORITIES.

I.

The statutes of Iowa, Chapter 6, Title XI., and the amendments thereto, McClain's Annotated Code, Sections 2360 to 2368, which are claimed to be unconstitutional, because they are in contravention of Constitution of the United States, are rigidly, restrictive, but are not completely prohibitory. For more than a generation the state has sought, by legislative enactments, to mitigate the evils of intemperance, and to prevent the sale of intoxicating liquors as beverages; but by the present, and by all preceding statutes, the sale of such liquors is, and always has been allowed, for use as a medicine, in the arts, and for culinary, and sacramental purposes, under certain restrictions, and at the hands of certain persons, licensed to sell them.

These statutes have been upheld and declared to be constitutional, by the supreme court, of Iowa, in many cases, besides the present, and notably in:

Collins vs. Hills, 41 Northwestern R., 571.
Grusendorf vs. Howat, 41 Northwestern R., 573.
Drake vs. Kaiser, 36 Northwestern R., 652.
Dickinson vs. The Heeb Brewing Co., et al, 73 Iowa, page 705.
Pearson, vs. International Distillery, 72 Iowa, 348.
Martin, vs. Blattner, 68 Iowa, 293.
State vs. Stucker, 58 Iowa, 498.
State vs. Santo, 2 Iowa, 165.

The last case cited, was decided in 1855, the present case in October, 1889, with many intermediate cases, all holding the same way. If this long series of decisions, and the established policy of the state, running through thirty-four years of legislation, is to be set aside; the man, or the business demanding it, at the hands of this court, should present the profoundest reasons, and the clearest right therefor.

The rule for the interpretation of a statute, as to its constitutionality, is clearly laid down by Chief Justice Waite, in 99 U. S., sinking fund cases, 718; thus: "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a reasonable doubt. One branch of government can not encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." With this rule in mind, we proceed to consider the reasons, argument and authorities, for sustaining the supreme court, of Iowa, in its decision in this action.

There is no pretense that plaintiff in error had, or ever applied for, any permit from the state, to sell the beer in question, or that, it was sold by their agent for purposes allowed by the statute. On the contrary, it is clear from the testimony certified in the record, that it was manufactured and sold as a beverage. John Leisey, the agent of plaintiffs, says: "We deliver this beer, after it is sold, about the city (Keokuk) in wagons, or otherwise. We sell to any person above age, who pays us the money for it. This particular beer in question, was here in my possession, as the agent of Gus. Leisey & Co., for sale at the time it was seized, and I was offering it for sale at that time." Record, page 10.

And the court made a finding of facts, to which plaintiffs have taken no exception, that "The said intoxicating liquors thus seized by defendant in his official capacity, as constable, were kept for sale in the premises described in the search warrant, in Keokuk, Lee county, Iowa, and occupied by Gus. Leisy & Co., for the purpose of being sold in viola-

tion of the provisions of the laws of Iowa, but which laws, the court holds, are unconstitutional and void." Record, page 14.

Now the statute of Iowa, which allows the sale of intoxicating liquor for useful and specified purposes, does absolutely forbid the manufacture and sale of such liquor, as beverages. It is this prohibitory feature, which plaintiffs claim, renders the statute unconstitutional. It is this which, they claim, limits and restrains their commercial rights, as citizens of the United States, under the clause of the constitution above named, and under the fourteenth amendment.

We admit that the word "commerce," as used in the constitution, embraces not only the transit, but the traffic of goods; and there is no doubt, but that the prohibition of the sale of intoxicating liquors, *as beverages*, does greatly diminish the amount thus consumed, and consequently does diminish the profits and business, of the manufacturer and venders thereof, as well as the receipts for transportation; but still, when other parts of the constitution, and the rights reserved to the states, and the true objects of good government, are duly considered, we contend that this statute of Iowa, is both constitutional and beneficent.

Neither the state, or nation, guarantees to any citizen profits, or perpetuity in business. Both states and congress have frequently passed laws, by which citizens have lost largely in business, profits and property; and such statutes have been upheld, because they were for the public good, or enacted in the interest of public health, safety, or morals.

More than forty years ago it was announced in the License case, 5 Howard, 621, that "it cannot be maintained that every law which tends to diminish the consumption of any foreign or domestic article, is unconstitutional, or violates the acts of congress."

In 1828 the state of Massachusetts incorporated "The Beer Company," which continued to manufacture beer in thatstate for over fifty years, when, in 1875, under an act of

the legislature, passed in 1869, its beer product was seized and declared forfeited. The case was carried to the Supreme Court, and this court says :

"The plaintiff in error boldly takes the ground, that being a corporation, it has a right by contract to manufacture and sell beer forever, notwithstanding, and in spite if any exegencies which may occur in the morals or health of the community, requiring such manufacture to cease. We do not so understand the rights of the plaintiff. The legislature had no power confer any such rights." * * * "If the public safety or public morals require the discontinuance of any manufacture or traffic, the hand of the legislature can not be stayed from providing for its discontinuance, by any incidental inconvenience, which individuals, or corporations, may suffer. All rights are held subject to the police power of the state."

Beer Co. vs. Massachusetts 97 vs. U. S. 32–33.

In Patterson, U. S. Kentucky, 97, U. S., 501, it was held that letter's patent could not protect the patentee in the business of manufacturing and selling a certain kind of oil, against the laws of that state, which restricted and restained him, because said laws were enacted under the police power, and for the public good, of the state.

In Mugler vs. Kansas, 123, U. S. 623, this court sustained the state legislation of Kansas, which in effect destroyed the business and property of the brewers of that state, upon the same ground, that the state legislature has declared it to be injurious to the health, morals, and safety of the community. It says: "Nor can it be said, that the government interferes with, or impairs, any one's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks, for general or individual use, as a beverage, are, or may become, hurtful to society, and constitute, therefore, a business in which no one may lawfully engage."

The same principle was held to apply to lotteries, in Stone, vs. Mississippi, 101 U. S., 814, and to Slaughter-houses

in Butchers Union Co. vs. Crescent City Co., 111, U. S., 746, and in Slaughter-house Cases 16, Wal., 36 62, to fertalizing establishments in 97 U. S., 656, Fertalizing Co., vs. Hyde Park, and to the manufactnre and sale of oleomargarine in Powell vs. Penna, 127, U, S., 679.

II.

Life, liberty, and the pursuit of happiness, are inalienable personal rights. The right of the state to pass appropriate and needful laws, for the protection of public morals, the public health, and public safety, is as certainly an inalienable state right.

By the tenth amendment to the constitution of the United States, "the powers not delegated to the United States by the constitution, nor prohibited, by it, to the states, are reserved to the states, respectively, or to the people."

The police power has not been taken away from the states, and could not possibly be surrendered to the general government by the states.

Cooley, Constitutional Limitations, 282-3.

Redfield Ch., I. 24, Vt., 149.

"No legislature can bargain away the public health or public morals. The people themselves can not do it, much less their servants." 101, U. S. 814, Stone vs. Mississippi.

The power to regulate commerce was a power originally inherent in the states. It belonged to them first. By this tenth amendment it was delegated to congress ; but this delegation of power to the Federal government, must be construed, interpreted, and of necessity limited, by the powers reserved to the states.

Plaintiffs in error claim the right to sell intoxicating liquors, is a necessary incident, to the delegated right to regulate inter-state commerce, that the right to transport would be a barren right, unless they could also sell the liquor, even although such sale, was contrary to the state law. If we admit this, and there is no way of reconciling the conflict, what should be the decision, as to which power, state or fed-

eral, should prevail? Shall the business claim, or property right, under the commercial clause of the federal constitution, a right only claimed to be a delegated right, derived from the states, prevail over an original, inalienable right, inherent in the states, under the police power, to legislate for and protect the public health, public morals, and safety? In such a case, we think the decision should uphold the original state right.

And where, as in this case, it is apparent that the sale of liquors, must nullify the prohibitory law of the state, if that law is a proper exercise of the police power of the state, the delegated commercial power must give way to the original reserved state police power.

But under the view, which we present hereafter, this possible contingency need never arise.

So that it becomes a question of classification, whether the enactment of this statute of Iowa, was a proper exercise of the police power of the state, right or needful, for the preservation of the public health and morals. If it is, it is constitutional and valid.

To answer this question, it seems to us, it is only necessary to read in Mugler vs. Kansas, the statement of the evils which confessedly flow from the use of ardent spirits, as beverages, and then to look at the provisions of the statute itself, and see if they are not fairly adapted, to protect the community against said evils.

In Mugler, vs. Kansas, 123 U. S., 661–2, the court says: "Keeping in view these principles as governing the relations of the judicial and legislative departments of government with each other, it is difficult to percieve any ground for the judiciary, to declare that the prohibition, by Kansas, of the manufacture, or sale, within her limits, of intoxicating liquors, for general use there, as a beverage, is not fairly adapted to the end, of protecting the community, against the evils which confessedly result from the excessive use of ardent spirits."

"There is no justification for holding that the state, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional rights; for we can not shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics, accessible to every one, that idleness, disorder, pauperism, and crime existing in the country are, in some degree, at least, tracable to this evil."

"If, therefore, a state decrees the absolute prohibition of the manufacture and sale, within her limits, of intoxicating liquors, for other than medical, scientific and manufacturing purposes, to be necessary to the peace and security of society, the courts can not, without usurping legislative functions, override the will of the people, as thus expressed by their chosen representatives; they have nothing to do with the mere policy of legislation."

A fuller statement of the evils which attend the use of intoxicating drinks, as beverages, to individuals, to home, to society, and to the government, appears in 72 Iowa, 360. Pearson vs. International Distillery. But a like indictment of the liquor traffic can be found in supreme court reports of every state in the union.

Josiah Strong, general secretary of the Evangelical Alliance, for the United States, in his recent work, entitled "Our Country," gives some startling statistics, and Van Volka, the eminent German statesman, has recently said: "Beer is a far more dangerous enemy to Germany than all the armies of France."

Gladstone says: "The liquor traffic inflicts more woe on man than the three great historic scourges—war, famine, and pestilence."

Now turn to the Iowa statute, and examine it.

By title, and provisions, this law relates to, and forbids the manufacture and sale of intoxicating liquors, *as beverages*, regulates its sale for other and useful purposes, and

by suitable penalties, of fine and imprisonment for its violation, secures its due enforcement.

In Bowman vs. Chicago and Northwestern Railroad Co., 125 U. S., 474–6, is contained a general summary of the provisions of this Iowa statute, and while one section of this act, Sec. 1553, which forbids any common carriers from bringing liquors into the state, without first obtaining a permit, was declared unconstitutional; yet, of this section, itself, on page 475, it is said: "It may, therefore, fairly be said that the provision in question, has been adopted by the state of Iowa, not expressly for the purpose of regulating, but commerce between its citizens, and those of other states, as subservient to the general design" (of the whole statute, which is stated to be,) "of protecting the health and morals of its people, and the peace and good order of the state, against the physical and moral evils, resulting from the unrestrained manufacture and sale, within the state, of intoxicating liquors."

Statutes of other states, having the same purpose, and limiting, restricting or prohibiting the manufacture and sale of intoxicating liquors have been held to be constitutional by scores of decisions in both state and federal courts.

13 New Hampshire, 576, Pierce vs. The State.
34 N. Y. Court of Appeals, Excise Board vs. Barrie.
7 Gill., 326, Bode vs. State.
21 Vermont, 456, Bancroft vs. Delmas.
15 Indiana, 449, Thomasson vs. State.
14 Illinois, 196, Jones vs. People.
25 N. W. R., 338, Mette vs. McGuckin.
5 Howard, 504, The License Cases
113 U. S., 27, Barber vs. Connelley.
123 U. S., 627, Mugler vs. Kansas.
112 U. S., 206, Foster vs. Kansas.
128 U. S., 1. Kidd vs. Pearson.

In Metropolitan Board of Excise vs. Barrie, 34 N. Y. Appeals, the case being one involving the liquor law of that State, the court says, page 666: "It is a bold assertion, at this day, that there is anything in the state or

United States Constitutions conflicting with, or setting bounds upon, *the legislative discretion or action*, in directing how, when and where, a trade shall be conducted in articles intimately connected with the public morals, or public safety, or public prosperity; *or, indeed, to prohibit and suppress such traffic altogether*, if deemed essential to effect the ends of good government."

In Mugler vs. Kansas, citing from Foster vs. Kansas, the supreme court of the United States, after a review of many cases in that court, says: "Finally, in Foster vs. Kansas, the court said the question, as to the constitutional power of the state to prohibit the manufacture and sale of intoxicating liquors, *was no longer an open one in this court.*"

In all these cases, and many more which might be cited, the restrictive and prohibitory liquor laws of the states, have been upheld as constitutional, upon the same general ground, that they were legitimately enacted, under the police power of the state, and did properly conserve, the public security, the public health and morals.

A fair and comprehensive statement of the scope and province of the police power of the state, is made by the supreme court, of Michigan, when discussing the constitutionality of a law of that state, which forbids the maintenance of a saloon, within one mile of the Soldiers' Home. In Whiting vs. Th. Board, 39 N. W. R., 44, the court says:

"The police power is a part of the law of the land, and all rights are held subject to it; without it, legal protection to life and property, and the peacefulness of the home, would cease to have any place in the land. The most sacred rights of the citizen, would be at the mercy of the lawless, and the desperado. Life would be endangered, and liberty and property would scarcely find an abiding place among men."

"The police power is not that wielded, as is often erroneously supposed, by the tyrant, or the despot, nor is it the rule of the anarchist which comes to destroy: but on the

contrary thereof, it is the destroyer of these. * * It is that power which protects and enables the law to become supreme : thereby securing the people civilization, liberty, peace and prosperity : and under a government like ours, allows the will of the majority to become a rule of action, and the law of the land, to which all must yield obedience."

"When properly understood, it is the right arm of regulated liberty, a menace to despotism and tyranny, and a terror to all evil-doers. It insures the protection and enforcement of the morality of the law, which makes law tolerable and desirable."

III.

What, then, is the provision in the Iowa statute, which plaintiffs claim to be unconstitutional? It is not Sec. 1553, Code of 1873, which pertains directly to transportation, and which this court held in Bowman vs. C. & N. W. Ry Co. to be unconstitutional, because it was extra-territorial, which provision has been repealed since the proceedings in the Bowman case were commenced and before this suit was instituted, as counsel for plaintiffs admits in his argument. See page 36.

But it is sections 2360 to 2368, set forth by copy in plaintiffs argument, and which provide that intoxicating liquors shall only be sold in the state for medicinal, chemical and sacramental purposes (not as beverages), and by qualified and licensed pharmacists, who shall be citizens of the United States and of the State of Iowa. It is in no sense a revenue scheme ; the pharmacists are not required to pay anything for their license, and the very blanks which they are required to use are prepared by the state and furnished to them "at cost." See Sec. 2372, Mc'Clain's Code.

These, the plaintiffs claim, are in contravention of Sec. 8, Article 1, Constitution of the United States, which provides that "Congress shall have the power to regulate commerce among the several states *, * ;" and they claim that this right of inter-state transportation of liquors, as commercial products, gives to them the right to sell said liquors,

as beverages, in the same original packages, as transported, irrespective of any, and every, statute of Iowa regulating or prohibiting this sale.

In support of this position, plaintiff's counsel cite no law of congress, no direct grant of power to congress to enact such a statute, no direct decision of the Supreme Court ; but they claim that this right, to disregard the liquor law of Iowa, exists by implication, from the direct grant of power given to congress, in said section 8; and that such position is sustained, by what is said in Brown vs. Maryland, 12 Wheaton, 419, decided in 1827, and in Bowman vs C. & N. W. Ry Co., 125, U. S. 465, decided in March, 1888.

Certainly the commercial interests of this nation are great, and the rights of commerce, to carry and traffic, in all kinds of commodities, regarded as property, are not to be disregarded.

But these rights of commerce *are relative, and not absolute*, and must be considered in connection with other public rights. And the article of commerce itself *must especially*, be considered in connection with the public welfare.

Plaintiffs counsel labors much, and cites cases to prove intoxicating liquors are property. If we grant it, that is not enough for this case. For arsenic is property, gunpowder, dynamite and nitro-glycerine are property ; and so oleomargarine, which is neither poisonous nor explosive, is property. All these are subjects of commerce, and entitled to be transported on railroads, but no one will say that the sale of these articles, can not be controlled by state, and municipal enactments.

We need not stop to cite cases upholding state laws regulating and controlling the sale of poisons and explosives as constitutional, and a proper exercise of the police power of the state. And this court, in Powell vs. Pennsylvania, 127 U. S. 685, has said the same thing respecting the law of Pennsylvania, which forbids the manufacture, sale or keeping for sale, of oleomargarine, holding "that the act is a valid exercise of the police power, and does not deprive any one of

rights of liberty or property, without due process of law, nor of the equal protection of the law as guaranteed by the fourteenth amendment of the federal constitution."

But plaintiffs counsel *fails*, and that without his fault, *to cite a single case, which holds the regulation of the liquor traffic, is not a proper subject for the exercise of the police power of the state.*

He cites 22 Iowa, 385, as saying intoxicating liquor is "an article of commerce;" but that case, page 385-6, also states, concerning the law of Iowa limiting its sale, etc., "The obvious reasons of these stringent provisions, is the great difficulty of suppressing the baneful use of intoxicating liquor as a beverage, which all experience has demonstrated to be a sure poison of the body, mind and soul of man. The appetite of the victims, and the love of gain of the vendor of this poison, rivaling each other, in insatiate thirst, successfully unite to evade and break down the usual barriers provided by law, to protect morals, health and the lives of the people."

He cites again the Supreme Court of Iowa in Connelly vs. Scarr, 72-224, as saying, when passing upon a contract for the sale of liquors, that intoxicating liquor must be regarded as property which may be freely bought and sold under the constitution of the United States; but he does not quote the next sentence of the report: "That while this is so, it does not follow that the states are for that reason cut off, from legislating upon all subjects relating to the health, life and safety of their citizens, although the legislation might indirectly affect the commerce of the country."

The latest expression of the Supreme Court of Iowa touching these provisions of the Iowa Code, is found in Collins vs. Hills, 41 Northwestern R., 572, and is as follows: "In their scope and object these statutes are not materially different from those which have been enacted for the restriction of the sale of poisons, and the regulation of the storage, handling, and the use of explosives, and other articles, dangerous to the lives or property of the people, or deleterious

to society; and they were enacted, in the exercise of same power, viz : the police power of the state."

The Supreme Court of Iowa, we think, are right, and that while for certain purposes liquors are regarded as property, yet they are not on a par with flour, grain, dry goods, or other common necessaries of life. Liquor, and the liquor business, are subject to restrictions, which such articles are not.

The general government taxes liquors and those engaged in that business, in addition to the state and municipal authorities. Both of the great political parties in the country, and the brewers themselves, advocate "high license," which is high taxation. But if any person should levy a tax on bread and wheat, as is done on whisky and beer, rebellion would follow it sooner, and fiercer, than it did on the taxation of tea, in 1776.

Now because of the character of the property in question, it is all the more clear, that plaintiff's claim is not well founded ; for if this right of transportation carries with it, the right of sale, then they can sell intoxicating liquor, when, where, to whom, and in such packages as they please; provided only, they sell it in the "original packages."

They can sell "original packages," large or small, of whisky and beer, by day and by night, to minors and drunkards, on election days, and days of riot, on fair grounds, and adjoining churches and school-houses ; for none of these matters, are regulated or controlled, by any federal legislation, or constitutional provision.

And on the contrary, *if they can be controlled, limited, regulated, or forbidden, in any of the above matters by state legistation, it must be done, only, under the police power of the state;* and if that be conceded, then, by the same power, all matters touching the keeping, and vending, of such liquor in the state, and indeed all matters whatever, except the right of importation, and of free inter-state transit, of such liquor, must be, and, as we claim, are, absolutely within the control of state legislation.

Not only does such a claim, ignore all prohibitory statutes and constitutions of the states, but all local option laws, and all license laws, whether high or low.

Must the high license statutes of Nebraska, the low license law of New York, the local option law of Georgia, with the constitutions of Maine, Kansas, and the two Dakotas, all be surrendered, at the behest of King Gambrinus, upon the judicial constriction of a constitutional provision, which has never before been invoked, for a hundred years. Is it clear "beyond all reasonable doubt" that this should be, or can be done? *Cui bono?*

But this is the spirit of the liquor traffic; not only to ignore all restraints of state laws, but to ignore the fourth commandment, and to run seven days and seven nights of every week in the year, where it can do so.

Plaintiff's position is, that the state of Iowa, although confessedly legislating for the public good of its citizens, and in the interest of public morals, and public health, has trenched upon their rights, as manufacturers and venders of semi-contraband goods; the improper use of which, is at war with every interest, which governments are formed to foster and protect.

They would have this court treat in all respects their business and consider their products as any other commercial business and products; whereas the universal trend of public intelligence, legislative enactment, and judicial interpretation, all go to show that the liquor business always has, and always should be, regulated by law, specially applied thereto.

The power to regulate and control the liquor traffic must be lodged somewhere. Now, in our country, this power must be in either the state, or federal government. Which shall it be?

In answering this question, let us notice, first, how the legislative, and then how the judicial department, of our country, have considered it.

STATE LEGISLATION.

FIRST. For over thirty years the legislature of Iowa has claimed to have had the right to pass laws restricting the sale of intoxicating liquors in the state.

Not only Iowa, but every other state and territory in the Union, has enacted laws, more or less stringent, regulating, and several of the states have adopted constitutional amendments, forbidding the manufacture and sale of intoxicating liquors, as beverages—clearly showing, that the people of all these states have, through a period of over seventy-five years, claimed the right to regulate, or to forbid, as they deemed best, the traffic in such liquor.

NON-ACTION OF CONGRESS.

Now it is a most significant fact, that, as against this nniversally asserted right, of state control of the liquor traffic, by state legislation, congress has never enacted a law denying it.

As to the effect of this non-action of congress, the cases in this court have not been uniform. The cases cited by plaintiff's counsel: Mobile vs. Kimball, 102 U. S., 697; Brown vs. Houston, 114 U. S., 631; Walling vs. Michigan, 116 U. S., 446; Wabash Railway vs. Illinois, 118, U. S., 573; and, perhaps, some others, favor the position taken, by plaintiffs—while other cases, notably: Wilson vs. The Blackbird Creek Co., 2 Peters, 245; Gibbons vs. Ogden, 4 Wheat., 1. Gilman vs. Philadelphia, 3 Wal., 713; Escanàba Co. vs. Chicago, 107 U. S., 678; Transportation Co. vs. Parkersburg, 107 U. S., 701; Peck vs. C. and N. W. R. Y. Co. 94 U. S., 178; Munn vs. Illinois, 94 U. S., 135; Morgan vs. Louisiana, 118 U. S., 466, and perhaps some others, hold the effect of such non-action of congress should be the other way, i. e., that congress, not having legislated upon the subject, has left the states free to do so.

We do not see, that the plaintiff's position is clearly indicated in the last case, in date, cited by him Wabash vs. Railway Co., October term, 1886, and in that case Chief Justice Waite, Justices Bradley and Gray, on page 581.

say that they "had supposed that question was concluded" (the other way) "by previous decisions of this court" —and the same question was passed upon, and is reported, in the same volume, among the reports of the same, October term, 1886, in the case of Morgan vs. Louisiana as follows:

The subject under consideration in that case was one arising under the same commercial clause of the constitution of the United States, on the matter of state quarantine, and the court, on page 466, says :

"For the period of nearly a century since the government was organized ; congress has passed no quarantine law, nor any other law to protect the inhabitants of the United States against the invasion of contagious and infectious diseases from abroad, and yet during the early part of the present century, for many years, the cities of the Atlantic coast from Boston and New York to Charleston were devastated by yellow fever. * * During all this time, congress never attempted to exercise this, or any power, to protect the people from the ravages of the dreadful diseases. *No doubt they believed that the power to do this belonged to the states.* Or, if it ever occurred to any of its members, that congress might do something in that way, *they probably believed, that what ought to be done, could be better and more wisely done, by the authorities of the states, who were familiar with the matter.*"

Now that is just what we claim about state legislation concerning the liquor traffic. Not only that the states can do this "better and more wisely, because they are more familiar with the matter," but that congress has all along through the century, "belived that the power to do this belonged to the states."

"Do not the respective states know what is best for the health, peace and good morals of their people? Should they not have the right to regulate their internal state policy in the way that seems best for their own citizens? Would it be wise, or safe, for the federal government to become so centralized, strong and despotic, or so paternal, if you please, as to undertake to make and administer police

laws for all the states? Would they not have to be diverse? The Supreme Court United States, in 5 Howard, 608, says of this matter: "As already stated, it is hardly possible for congress to deal at all with the details of this complicated matter."

Again, on page 632, of this report, the court says: "It is not necessary for the sake of justifying the state legislation, now under consideration, to array the appalling statutes of misery, pauperism and crime which have their origin in the use or abuse of ardent spirits. The police power, which is exclusively in the states, *is alone competent to the correction of these great evils*, and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority."

In discussing this matter in Cooly vs. Board, of Port Wardens, 12, Howard, 319, the Supreme Court says: "The diversities of opinion, which have existed on this subject, have arisen from the different views taken of the nature of this power."

And not only is this so, but it has chiefly been, *because of the particular traffic, or the business to be affected*, which has been the controling matter in the action, or non-action of congress, under the commercial clause of the constitution.

And the court further says, on page 319: "That the power to regulate commerce, embraces a vast field containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every part, and some, * * * *as imperatively demanding that diversity, which alone can meet the local necessities of navigation.*"

"Either absolutely to affirm or to deny that the nature of this power requires exclusive legislation by congress, is, to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part."

Now it seems to us that nothing is more clear than that the regulation and control of the liquor traffic is, and of necessity must be, a matter of local concern, for each state to regulate by state law ; and that no general congressional enactment could meet the case. To illustrate : Iowa has a restrictive and prohibitory law. Illinois has a license law. There is nothing in the Iowa statute which prohibits the free importation of intoxicating liquors from Illinois ; and there is nothing in the Illinois statute which prohibits the free importation of liquor from Iowa, into Illinois.

Now, shall such a construction be given to this commerce clause of the constitution, or to the non-action of congress thereon, which will permit the citizens of Iowa, and Illinois respectively, by simply changing their stocks of liquor, from one state to the other, to evade, and practically nullify the laws of both states ? In other words, can a citizen of Illinois, who can not sell intoxicating liquors in his own state, except by conforming to the license law of his state, by shipping his liquors over into Iowa, sell them freely in Iowa, in violation of its laws ; and, can a citizen of Iowa, who can not sell his liquors in Iowa, at all for beverages, by shipping his liquors over into Illinois, sell them there, without taking out a license, such as the law of that state requires ?

The latest expression of the Supreme Court, as to the non-action of congress, in this matter, which we remember, is in Bowman, vs. C. and N. W. Ry. Co., 125, U. S., 482–3, where the court says that congressional non-action *on inter-state commerce* is a matter of much greater significance than that in respect *to foreign commerce.*

That although " The power conferred upon congress to regulate commerce among the state is indeed contained in the same clause of the constitution, which confers upon it the power to regulate commerce with foreign nations," it is also stated that :

" *The same necessity, perhaps, does not exist equally, in reference to commerce among the states.*"

" Laws which concern the *exterior relations* of the United States, with other nations and governments, are

general in their nature, and should proceed, exclusively from the legislative authority of the nation."

"And yet in respect to commerce among the states, it may be for the reason already assigned, *that the same inference, is not always to be drawn from the absence of congressional legislation, as might be in the case of commerce with foreign nations. The question, therefore, may be still considered in each case as it arises*, whether the fact that congress has failed in the particular instance, to provide by law a regulation of commerce among the states, is conclusive of its intention that the subject shall be free from all positive regulation, or that, until it positively interferes, such commerce may be left to be freely dealt with, by the respective states."

And if it is an open question whether the states can legislate on, and control all sales of intoxicating liquors in their own boundaries, then we contend that by the rule of construction of statutes, upon the weight of authority, and because of the subject matter, state legislation thereon should be upheld.

CONGRESSIONAL LEGISLATION.

As further evidence of the fact, that congress has regarded this class of legislation, concerning the liquor business, as properly belonging to the states, and to which evidence, we attach great importance :

We cite Section 3243, Revised Statutes, United States, which directly recognizes the prohibitory liquor law of the states, and declares that persons taking out United States licenses to sell intoxicating liquors, shall not be protected, or relieved, from any fines or penalties imposed by state laws, for the sale of such liquors.

What is this but congressional recognition, at least, of the right of state regulation, of the liquor traffic? And may not this court say as much in commendation and recognition of state legislation, on the liquor business, as is said in Morgan, vs. Louisiana, *supra*, about state regulation of quarantine matters ?

INTER-STATE COMMERCE DECISIONS.

SECOND. Let us now turn to the judicial departments of our government, state and national, to see how far, and to what subjects, they have held, that this Section 8, Article 1, of the constitution applies; and particularly, to such decisions, as have duly considered the liquor traffic in connection with said section.

We can not of course cite, or comment upon all of them, for this court has well said, "their name is legion."

In the first place, there is a line of authorities, some of which are cited by plaintiffs, which hold that state laws imposing discriminating burdens upon the persons, or products of other states, which laid state duties on imports,—taxes upon emigrants landing in this country, and the like, to be unconstitutional. But the case in hand is not one of that kind. No class of legislation falls more clearly under the police power of the state, than does the liquor traffic; and no business requires more careful, minute, and constant supervision and control than this; and none is so restive under restraint, or so versatile in its evasions of law. It would be utterly impossible for congress to frame a general law, which should properly conserve the public good, and at the same time, duly restrain this business in all the states.

The United States Circuit Court, District of Iowa, in Kohn vs. Melcher, 29 Federal Reporter, page 465, says: "The mere fact, however, that certain State laws may more or less directly effect inter-state commerce, or persons engaged therein, is not always proof that such laws are beyond the power of the State to enact, or that they violate any provision of the federal constitution. There is reserved to the several States the right of police regulation; that is to say, the power to enact laws, promotive of domestic order, morals, health and safety. Such statutes, solely intended for the promotion of these objects, would not be rendered invalid by the fact that thereby, inter-state commerce might be somewhat restricted."

The Supreme Court of the United States, in Sherlock vs. Alling, 93 U. S., 103, says: "In conferring upon con-

gress the regulation of commerce, it was never intended to cut off the states from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly effect the commerce of the country. Legislation, in a variety of ways, may effect commerce and persons engaged in it, without constituting a regulation of it, within the meaning of the constitution."

It is stated, in Nathan vs. Louisiana, 8 Howard, 82, that: "The Federal Government can no more regulate the commerce of a state, than a state can regulate the commerce of the Federal Government. * * *"

And this court, when considering the constitutionality of state laws, *not pertaining to the liquor traffic*, but upon a variety of other subjects, each of which laws more or less affected inter-state commerce, and all of which were considered in connection with this commercial clause of the Constitution, has held, that this 8th section, article 1, Constitution of the United States did not prevent the State from enacting a valid law in New York, subjecting, under severe penalties, a master of a vessel arriving from a foreign port, who neglected to report to the Mayor of New York a full list of his passengers on board, or landed in transit, since she left her home port; nor one, in Louisiana, assessing a tax upon a broker dealing exclusively in foreign bills of exchange, 8 Howard, 73; nor one in Alabama, which assessed a heavy tax on auction sales of goods and merchandise, *the products of States other than Alabama, sold in Mobile to purchasers in the original and unbroken packages*, 8 Wal. 123-4; nor, a municipal ordinance of Mobile, which required an express or railroad company having an office in Mobile, to pay a license fee of $100 for doing business within the State, and $500 for doing business beyond the limits of the State, 16 Wallace, 479; nor, a law of the State of Indiana, touching and extending the liabilities of parties for marine torts, resulting in death of persons injured, 93 U. S. 99; nor, a statute of Illinois, regulating warehouses, 94 U. S. 135; nor, a law of Wisconsin, regulating railroad and telegraph companies, 94 U.

S. 177 ; nor, a statute of Kentucky, regulating the inspection and gauging of coal oil, in derrogation of letters patent, 97 U. S. 591 ; nor, a statute of Louisiana, under which a tax was levied upon a lot of coal shipped from Pennsylvania to New Orleans, and there sold by shipload, in which it was transported, 114 U. S. 622 ; nor, yet another, most stringent law of the State of Alabama, which required, under heavy penalties, that engineers of all railroads running into, and beyond the limits of the State, to pass the inspection of, and be licensed by, a State Board of Inspectors, and under which an old engineer, upon the interstate, Ohio & Mobile Railroad, was taken from his train, put into prison, and refused a writ of habeas corpus, both by the Supreme Courts of Alabama, and of the United States, because he had neglected to comply with the provisions of said law.

In this last case, Smith vs. Alabama, 124 U. S.. 465, decided January 30th, 1888, only six weeks before Bowman vs. C. & N. W. Ry. Co., although it appeared that Smith, when taken from his engine, was operating the regular passenger trains upon said railroad, which was running between different States, and carrying the United States mail, perishable freight, money packages and passengers ; and although the court admitted the law in the question, did effect the transactions of commerce among the states, yet the court held that it was not such a regulation of interstate commerce as to make it invalid, but was " * * * properly an act of legislation, within the scope of the admitted power reserved to the State * *."

Now compare this, and the other State laws, under consideration in the cases *supra*, with the liquor statutes of Iowa, and two things must readily appear :

First, That these liquor statutes of Iowa, as of all other states, clearly pertain directly to the public health, morals, peace and prosperity of the citizens, and as such, fall clearly within the police power of the legislature to enact.

Second, That they, only in an indirect manner, and in a remote degree, effect commerce between the states, and not nearly so much, as many of the cases above cited.

We next turn our attention to some cases in which this commercial clause of the constitution, has been under consideration, in connection with the subject of the manufacture, sale, or transportation of intoxicating liquors; with two or three other cases, which plaintiffs have associated with them.

Brown vs. Maryland, 12 Wheaton 519, decided in 1827; and Bowman vs. C. & N. W. Ry Co., 125 U. S. 465, decided in March, 1888, are the two cases much relied upon by plaintiffs. Neither of them are parellel cases with the one we are now considering.

The first, Brown vs. Maryland, was not a case of interstate commerce, but of foreign commerce, and the single expression in the opinion of the court, in that case, to which so much importance has been attributed in these late times, is, that found on page 449, viz: "It may be proper to add, that *we suppose* the principles laid down in this case, to apply equally to importations from sister states."

Of this "supposition" we may remark it was dictum and not decision. It was not on a matter in the case.

Nor has this been overlooked by the same Supreme Court, for afterwards, in 1846, Judge McLean, in the License cases, speaks of it as " * * a *remark* which must have been made with less consideration than the other points ruled in this case."

And still later, in 1868, the Supreme Court, in the case of Woodruff vs. Parham, 8 Wallace, 139, opinion by Miller, Justice, says of it: "The *casual remark*, therefore, made in the close of the opinion 'that we suppose the principles laid down in this case to apply equally to importations from a sister State,' can only be received as an intimation of what they might decide if the case ever came before them, for no such case was then to be decided. *It is not, therefore, a judicial decision*, even if the remark was intended to apply to the first of the grounds on which that decision was placed."

Although doubtless it is known to this court, yet the court will permit us to note the difference in the facts of the

case, and of the statute of Maryland also, with the case in hand :

1st. The law of Maryland was not a police regulation. It was a revenue act, and taxed "all importers of foreign articles."

2nd. It has no reference to public health or morals—taxed dry goods and other similar, common, and useful articles.

3rd. It was a tax on business—for privileges of importing—had to get a license to sell articles as imports, not to sell the articles after they arrived in the State.

4th. The tax was on foreign importations alone—not on domestic goods carried from one State to another.

The statute of Iowa is unlike that of Maryland, in that:

1st. It makes no distinction between foreign and domestic liquors.

2nd. It is purely a police law enacted, like the oleomargarine law of Pennsylvania, for the preservation of the public health. Also, for the benefit of public morals, and the prevention of crime and pauperism.

3rd. The Iowa law levies no tax, either on the importer, or on the business of importation, or on the articles imported.

4th. It is in no sense a revenue scheme, as the Maryland statute was, distinctively. No money is received by the State or municipality, even the blanks required to be used, in the business, are printed and furnished by public authorities of the state "at cost."

5th. It does not forbid the importer from selling liquors. It only requires the sales thereof, shall be made by proper licensed persons, for proper and useful purposes, which may do good, but which will not produce evil and trouble in, and to, the state.

Brown was an importer, and his suit grew out of the fact that he failed and refused to pay a State tax, on a sale of dry goods, after he had paid a duty to the Federal govern-

ment on its importation. Plaintiff, in error, are brewers making beer in Peoria, Illinois, who transported the beer to their agent in Keokuk, Iowa, for sale, contrary to the laws of Iowa. In no sense are plaintiff's importers. With the former it was a case of foreign commerce ; with the latter it is a case of inter-state commerce. So that neither the law or the facts of the case, in hand, are like the case of Brown vs. Maryland.

Twenty years, after the Maryland case was decided, when the supreme bench had been entirely changed, the exact question involved in this case came up for decision, and this court held the law to be, as we claim it here, in one of the license cases reported in 5 Howard, 504. Chief Justice Taney, on page 578, thus states the facts of that case :

"The plaintiffs in error, who were merchants in Dover, in New Hampshire, purchased a barrel of gin in Boston, brought it to Dover, and sold it in the cask in which it was imported, without a license from the selectmen of the town. For this sale, they were indicted, convicted, and fined, under the law above mentioned."

It was a sale of a large "original package" of imported gin, on which the duty had been paid—and which had been transported from one state to another, coast-wise, and sold in New Hampshire, by plaintiff in error, without having complied with the law of that state. This same provision, Section 8, of the Constitution of the United States, was urged as giving the right of sale, based upon the right of transportation. This celebrated case, which has been referred to by this court, over thirty times since, is so familiar that we need make no long citations from it. Although different reasons were assigned by the judges, yet they all reached the same conclusion, and the decision affirming the judgment of the Supreme Court of New Hampshire, was unanimous, and is in these words, page 633 :

"This cause came on to be heard on the record from the Supreme Court of judicature in, and for, the first judicial district of the state of New Hampshire, and was argued by

counsel. On consideration whereof, it is now here ordered and adjudged *by this court, that the judgment of the said Superior Court of judicature in this cause be, and the same is hereby affirmed with costs.*"

Some of the reasons assigned, notably those founded on the non-action of congress, have been antagonized in some of the subsequent cases; but the reasons assigned by Daniels and Woodbury, J. J., that the right of importation *did not* carry with it the right to sell the imported article, contrary to the state law; and, that the state had the absolute right to regulate, or forbid, the sale of intoxicating liquors, as a police regulation, have never been judicially denied; and the decision itself, "of the court," has never been overruled.

Justice Field, in his dissenting opinion in Mugler vs. Kansas, 123 U. S., 676, in 1887, says: "The construction of the commercial clause of the constitution, upon which the license cases in 7th (5th) Howard were decided, appears to me to have been substantially abandoned in later cases"; but in his (Justice Field's) concurring opinion, in Bowman vs. C. and N. W. R'y Co., 125 U. S., page 507, afterwards rendered in the same year, he shows, that he was then referring to the reasons given rather than to the decision itself, in the license cases, by some of the justices, to-wit: to the matter of the non-action of congress, for he there says: "The judges differed in their views in some particulars but the majority were of opinion that the states have authority to legislate upon subjects of inter-state commerce until congress had acted upon them; and as congress had not acted, the regulation of the states was valid. The *doctrine thus declared*, has been modified since by repeated decisions."

We will not repeat what we have said, *supra*, about this "doctrine," nor of the effect, and construction to be put upon the non-action of congress; but we do affirm that the Supreme Court itself, has never overruled the license cases, and no less than four pages of the opinion pronounced by Matthews, J., in the Bowman case, 125 U. S., 476-7-8-and-

9, is taken up in recognizing the authority of the license cases, and in an argument to show that the Bowman case was not in conflict with it. And in the concluding part of the opinion by Matthews, J., page 499, he distinctly states concerning the question of inter-state commerce that "It is not necessary now to express an opinion upon the point, because that question does not arise in the present case."

And in the very case in which Justice Field made the remark above quoted, viz.: Mugler vs. Kansas, 657-8, the Supreme Court says of the license cases: "Although the members of the court did not fully agree as to the grounds upon which the decision should be placed, they were unanimous in holding that the statutes, then under examination, were not inconsistent with the Constitution of the United States, or with any act of congress."

The license cases are directly approved in 8 Wal., 138, Woodruff vs. Parham, says Justice Miller, for the court: "But no one can read the opinions, which were delivered, without perceiving that none of them hold that goods imported from one state into another, are, within the prohibition to the state to levy taxes, or imposts, and the language of the Chief Justice, and Judge McLean, leave no doubt that their views were adverse to the proposition."

The latest cases in the United States Supreme Court, in which the principle of the license cases is distinctly recognized, and affirmed, are:

127 U. S., 649. Le Loup vs. Mobile.
127 U. S., 676. Powell vs. Pennsylvania, and
128 U. S., 1. Kidd vs. Pearson, *et al.*

In the first case, after stating the three general classes of cases, in which the States are excluded from legislation, to-wit: "That a state has no right to levy a tax on inter-state commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or, on the receipts derived from that transportation; or, on the occupation or business of carrying it on," (and under none of which does the Iowa statute come,) the court is careful to add that, "We may here repeat what we have so often

said before, that this exemption of inter-state commerce from state regulation, does not prevent the state from taxing the property of those engaged in such commerce, located within the state, as other property of other citizens is taxed, *nor from regulating matters of local concern, which may incidentally affect commerce.* * * "

Powell vs. Pennsylvania, was the oleomargarine case. The state of Pennsylvania passed a statute, which did more than regulate—it actually forbid the making, keeping, and selling of this new article of commerce ; and while it was an open secret, that the law was passed in the interests of the dairymen of that state, yet because it was stated in its caption and purported to be, a statute to preserve the public health, etc., the Supreme Court held that the State Legislature of Pennsylvania, was the sole, and final judge, to pass upon that matter, and, therefore, the law was upheld.

Now, if the legislature of Pennsylvania has the constitutional right to say what shall not be sold to her citizens *to eat*, has not the legislature of Iowa the coustitutional right to say what shall not be sold to her citizens *to drink?* How much better is whisky for the citizens of the Hawkeye State, than oleomargarine is for the citizen of the Keystone State ?

Again, Powell, the plaintiff in error, was a merchant in Philadelphia, and was fined for selling oleomargarine, which was manufactured in Pennsylvania. Now, suppose he had gone over to Camden, N. J., and had manufactured the oleomargarine there, and had shipped it by a common carrier to himself in Philadelphia, and had undertaken to sell that oleomargarine in Philadelphia ; would the simple transit of the goods across the Delaware have protected the sales of the New Jersey oleomargarine in Pennsylvania ? and would the same law of Pennsylvania which this court has held to be constitutional, and under which Powell was fined, have become unconstitutional, or powerless, to punish Powell, for this supposed act of business legerdemain ?

Now, what we have supposed above about Powell, was, what was actually done by Gus. Leisy & Co. They built a

brewery and made beer in Keokuk years ago, but seeing the unfriendly legislation in Iowa against beer, they went to Peoria, Ill., and commenced its manufacture there, and left an agent here in Iowa, to whom they ship the beer for sale in the same premises, still owned by one of the firm. Shall they thus circumvent and defy our law ?

But the last case named above, Kidd vs. Pearson *et al.*, which is the same case of Pearson *et al.* vs. The International Distillery *et al.*, reported in 72 Iowa, 348, and which affirms it, holds that the statutes of Iowa * * which prohibit the manufacture and sale of intoxicating liquors within the State * * are not in conflict with the Constitution of the United States, Article I., Section 8, as an attempt to regulate commerce between the states. * *."

Justice Lamar, for the Court, on page 26 of this report, has well said that: "The police power of a state is as broad and plenary as its taxing power, and property within the state is subject to the operations of the former, so long as it is within the regulating restrictions of the latter."

It appears by the testimony of John Leisey in our case that the plaintiffs have been keeping for sale, and selling, from their brewery warehouse in Keokuk, large quantities of beer ever since 1884. See testimony of John Leisey, record, page 9.

It will not be contended that this changing stock of beer, could not be taxed just like any merchant's stock of goods could, and, if it can be taxed, it can be controlled and regulated under "the police power of the state," for this "is as broad and plenary as its taxing power. * *"

"ORIGINAL PACKAGES."

If sales are allowed at all, they must be in original packages. What does this mean ?

1st. It is clear that on imported articles it means, in the box, barrel, bale or other package, in which the article comes into the country. This was the case in Brown vs. Maryland, and in the license cases.

2nd. In respect to inter-state commerce, we think it would mean nothing less, than, the packages in which the goods would be put up *for the wholesale trade*. It is in such packages that manufacturers usually, and almost always, ship and sell goods.

3rd. Certain it is, that it could not be reduced down, in the case of intoxicating liquors, to a pint, a half-pint, or a single drink, any more than it could in the case of dry goods, to a few yards of cloth, or to a single hat, in a case of hats. For, as Catron, Justice, in 5 Howard, 608, says: "To hold * * spirits coming in from other states as articles of commerce would open the door to almost an entire evasion, as spirits might be introduced in the smallest devisible quantities *that the retail trade would require!*"

Now this is just exactly what has happened. Daily there is being shipped into Iowa, from Illinois and other states, whisky and beer in half-pint bottles, as "original packages," and unless this traffic is stopped, the saloons in which they are sold, might as well sell by the drink, and let it be drunk on the premises.

4th. Nor will it do to claim this right to sell, irrespective of the original package, i. e., simply by reason of "identity of goods," or of liquors, because this would at once open a free, untaxed, unlicensed saloon, everywhere.

Rectifiers change, mix, and manipulate liquors, but saloon men do not. They sell the "identical goods" which they buy, and get from other states.

TIME AND PLACE.

It will be readily admitted that intoxicating liquors can not be brought into and kept, in the state *perpetually*, or *indefinitely*, without becoming subject to the laws of the state. When and where then, does the commercial power of congress, under the Constitution end, and when, and where, does the police power of the state begin?

We think the said commercial power controls the transit of the goods, but that when the transportation is ended,

and the goods, *which are brought into the state for sale therein*, are delivered to the consignee, or owner—as the beer in this case was—that then, there, and thereafter, the state law takes hold of them, to tax, to regulate, and control, the sale of same. Our opponents say, not until the "importer" has sold them, or, at least, not until he has so broken up the "original packages," and blended them with the general mass of property in the state.

We will briefly give our reasons and authorities for our position on this subject, without elaboration :

1st. Because of the certainty of time and event, made so by the act of receiving the goods ; and, per contra, because of the uncertainty of time, of when sufficiently "blended," etc., and of how much "breakage" would be required to establish the other view.

2nd. It would practically prevent the wholesale trade, which, of itself, would be a restraint upon commerce ; or,

3rd. It would require the importer and manufacturer to put up their goods in such small quantities, to suit the retail trade, which in many cases would be impracticable.

Few want a hogshead of sugar, all want a few pounds ; few want a bolt of muslin or a roll of carpet, all want a few yards.

Few want a barrel of whisky—some want a dram, and want it often.

In the present case, plaintiffs sold nothing less than "a one-eighth," which is a five-gallon keg of beer. A poor man could neither afford to buy that much at a time, nor could he drink it up before it would spoil.

4th. It would not do to say that the man who first receives the goods from another state *alone* is protected, for that would be a special "immunity," not allowed under the constitution) And if "A" could thus get whisky from another state and put it in his warehouse, then while it was there in the same barrels, and place, could he not sell and convey his right to "B," and "B" to "C," and so on indefi-

nitely? We ask: Why not? "A" pays no duty. The property in hands of "B" has no more become "blended" with the general mass of property in the state than when "A" owned it. And the package has not been "broken" at all. Again, all laws of the United States must be uniform, and must protect all citizens alike.

5th. Again, it will not do to say it is protected under the constitution "until after the first sale in the state is made," and that then, and thereafter only, is it blended with the general property in the state, and become liable to state police laws, etc, for in the case of liquors sold at retail, they are usually drank at once, and the evil is then done, and there is no blending, etc.

6th. But it is not the first sale, in the state, which is claimed is thus privileged, but the first seller. He gets the right, it is said, by the fact that be brought the articie into the state through inter-state transportation. Well, then, we see nothing in the constitution which requires such an one to sell the whole lot, or a whole package, at once. If he has the right, as first man, to sell a whole hogshead of sugar, or a whole barrel of whisky, he would have the same right, as first man, to sell it in parts, or fractions. If, so long as he keeps the whole package, he does not blend it with the mass of property in the state, in what respect does he blend the part which he has not yet sold, with the general property in the state?

As upholding our position on this question of the time and place, we cite the following

AUTHORITIES:

5 Howard, 586. Taney, C. J., says, speaking of the tun of gin, which was the subject of controversy in that case: " * * the traffic in the article may be lawfully regulated by the state, as soon as landed in the territory, and a tax imposed upon, or a license required, or the sale altogether prohibited."

The other judges, especially Woodbury and McLean, express the same view.

In 10 Wal., 565. The Daniel Ball., the Supreme Court tells us when inter-state commerce has commenced, in these words: "Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced."

So, in 116 U. S., 525; Coe vs. Errol, the court says: "There must be a period of time when they (goods being transported from one state to another,) cease to be governed exclusively by the domestic law, and begin to be governed and controlled and protected by the national law of commercial regulations, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the state of their origin to that of their destination."

These two, and the recent case of Kidd vs. Pearson, *supra*, furnish the authority, as to when the federal law begins to affect the commerce between the states. They also, by necessary inference, furnish the authority as to when the federal law ends, and that it ends with the termination of the transportation.

When the railroad, in this case, delivered the beer to plaintiff's agent, at the depot in Keokuk, inter-state commerce in it terminated. The hauling of that beer out to the warehouse on Johnson street, and afterwards retailing it from there by teams, was internal commerce, both by traffic and team transportation, with which, inter-state commerce has nothing to do.

114 U. S., 633; Brown vs. Huston, says: "But, if after their arrival within the state—that being their place of destination for use or trade—if, after this, they are subjected to a general tax laid on all property within the city, we fail to see how such a taxing can be deemed a regulation of commerce, which would have the objectionable effect referred to."

In 129 U. S., 497; Robbins vs. Shelby Taxing District, it is said: "When goods are sent from one state to another for sale, they become part of its general property, and amenable to its laws. * *"

And in 125 U. S., 499; Bowman vs. C. and N. W. R'y, Matthews, J., says: "But the right to prohibit sales, so far as conceded to the states, arises after the act of transportation has terminated; because the sales which the state may forbid, are of things within its jurisdiction. Its power over them does not begin to operate until they are brought within the territorial limits which circumscribe it."

But it does begin then and there; and thereafter, the state law continues to control, as the foregoing authorities clearly show. To the same purport, see also:

9 Wheaton, 1. Gibbons vs. Ogden.
5 Wal., 470. License Taxing Cases.
123 U. S., 623. Mugler vs. Kansas.
127 U. S., 127. Le Loup vs. Mobile.
127 U. S., 271. State vs. U. S. Express Co.

To our minds, the facts of this case utterly fail to show that the sales of beer, as made by plaintiffs' agent in Keokuk, were rendered lawful, under the plea of inter-state commerce.

The evidence clearly shows that the beer in question was manufactured in Peoria, Illinois, and shipped to Keokuk, Iowa, "to be sold in violation of the laws of Iowa," and the court so found. See record, page 14. That the act of inter-state commerce ended, as plaintiffs intended it should, when the beer was delivered by the railroad in Keokuk to their agent, John Leisey. That all the subsequent acts by their agents in Keokuk, viz., hauling the beer by teams from the depot on the river, out to the brewery warehouse, a distance of over one mile, (being from one place to another in the same state), storing it there, and from there retailing and delivering by the keg to customers in Keokuk, are purely acts of internal commerce by traffic and carriage, which a state has the absolute right to regulate and control as it sees fit.

This was made plain as early as 1824, when the Supreme Court, in the case of Gibbons vs. Ogden, 9 Wheaton, 195, where the court, in commenting on these words of the constitution, says: "It is not intended to say that these

words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconsistent, and is certainly unnecessary." See also :

45 Iowa, 338. Council Bluffs vs. K. C., St. J. and C. B. R'y Co.
59 Iowa, 148. Carton & Co. vs. I. C. R. Co.
70 Iowa, 271. State vs. U. S. Express Co.
8 Howard, 82. Nathan vs. Louisiana.
12 Howard, 299. Cooley vs. Wardens, Phila.
125 U. S., 493. Bowman vs. C. & N. W. R'y Co.

In this last case, the court says : "It is conceded, as we have already shown, that for the purpose of its policy a state has legislative control, exclusive of congress, within its territory, of all persons, things, and transactions of strictly internal concern. For the purpose of protecting its people against the evils of intemperance, it has the right to prohibit the manufacture, within its limits, of intoxicating liquors ; it may also prohibit all domestic commerce in them between its own inhabitants, whether the articles are introduced from other states or from foreign countries ; it may punish those who sell them in violation of its laws * * ."

The case of Kidd vs. Pearson, 9 Supreme Court Reporter, 6, quotes largely and approvingly, from Gibbons vs. Ogden, The Daniel Ball, and Coe vs. Errol, *supra*, and all through the decisions, the doctrine is fully recognized, as stated in 8 Howard, 82, that "the Federal Government can no more regulate the commerce of a state, than a state can regulate the commerce of the Federal Government."

So we claim that the law is clear, and that the application of it, to the facts of this case, is not difficult. John Leisey, page 8, record, says : "This beer had been sent by Gus. Leisey & Co., from Peoria to Keokuk by railroad, and at the time it was seized by Constable Hardin, the defendant, it was stored away in premises owned by Christine Leisey, on the corner of Thirteenth and Johnson streets

(Keokuk), which premises had cellars and other proper facilities for keeping keg and bottled beer." It was Leisey's old brewery, where they formerly manufactured beer.

On page 10, record, he says: "We deliver this beer, after it is sold, about the city (Keokuk) in wagons, *or otherwise.*" We suppose the "otherwise" means in hand, on the premises. He adds: "We sell to any person above age, who pays us the money for it." Same page, he says: "This particular beer in question was here in my possession, as the agent of Gus. Leisey & Co., *for sale at the time it was seized, and I was offering it for sale at that time.*"

And the court made a finding, to which plaintiffs have taken no exception, that: "The said intoxicating liquors, thus seized by defendant in his official capacity, as constable, were kept for sale, in the premises described in the search warrant, in Keokuk, Lee county, Iowa, and occupied by Gus. Leisey & Co., for the purpose of being sold in violation of the provisions of the law of Iowa. * *." Record, page 14.

Thus it not only appears that plaintiffs not only violated the laws of Iowa in transporting their beer, between different points in this state, in keeping it for sale, and in actually selling it at retail in the state, contrary to the laws of the state, but that they have wrongfully replevined it, as hereinafter shown, and since they got possession of it from defendant, "have sold it," and have thus put it beyond their power to return it, and comply with the terms of their replevin bond; hence they, and their bondsmen, have become liable for the value of the beer seized, which they state, and which defendant acknowledges, to be five hundred and forty dollars.

And further quoting from the case of Brown vs. Maryland, on page 268, we see the reason of the argument in that case to be based upon the apparent error fallen into by the court, as to the object of the congress of the United States in the purpose of imposing duties for importing foreign goods into the United States, to be "the whole cause of legislation on the subject, shows, in the opinion of the legislature,

is connected with the payment of duties," however that opinion might have been at the time of the decision in that cause, we all know as a matter of history it does not now prevail. The whole course of legislation on the subject at this time—that it is in the opinion of the legislature and the opinion of the statesmen of to-day, is that the payment of duties to the United States is enforced for the use and benefit and good of the people of this country, in protecting the people of this country from the competition of the pauper labor, and lower wages of the other nations of the world more thickly inhabited than this country; and the economic of this country shows at every political campaign, and every action of congress on this subject, to be by the people, and for the the people. And therefore at this time as between the people of this country, whether he be a dealer at wholesale or retail of imported articles or of articles transported from one state or territory to the other, in the original form or package, or in broken packages, can make no difference, because as before the law all the people in this country stand upon the same footing, and have, and must necessarily have the same "inalienable rights" in their "life, liberty and the pursuit of happiness," and there is no distinction in color, or social or political position between the people of this country. And the court itself, in announcing the opinion in the said cause, in order to make the arguments thereof tenable, and not deprive the states of the ordinary sources of revenue by taxation for their continuance, makes a destinction between the people of this country by reason of their being wholesale or retail dealers, carrying on a large or small business having great capital or small capital, and being an importer and not being engaged in importing goods for sale—and being a dealer in foreign or domestic goods, making a distinction so great that Justice Thompson was compelled to dissent from the court and use the following language, the argument of which is unanswerable under our form of government where the people govern for the people. "The counsel however, aware that the principal thus broadly laid down, if practically carried out to its full extent, would lead to consequences so obviously untenable that it would at

once show the unsoundness of the principal itself, have limited its application to the first wholesale disposition of the merchandise. Can such a distinction however be sustained? There is nothing certainly in the letter of the constitution to support it; nor does it fall within any reasonable intendment growing out of the nature of the subject-matter of the provision * * * * The constitution nowhere gives any extraordinary protection to the importer, nor is there, according to my judgment any national grounds upon which the constitution may be considered as extending such exemption to wholesale and not to retail dealers." The constitution of the United States nowhere makes any distinction between the people of the United States, but on the other hand the constitution of the United States provides Article IX: "The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people," and Article X: "The powers not delegated to the United States by the constitution nor prohibited by it to the states are reserved to the states respectively or to the people," and section XIV. adopted since, provides all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the priveleges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. The preamble of the constitution of the United States commences with: "We, the people of the United States, * * * do ordain and establish this constitution of the United States of America."

And in Section 8, Article 1, where the powers are confered upon congress "to lay and collect taxes, duties, imports and excises to pay the debts and provide for the common defense and general welfare of the United States; provides but "all duties and excises shall be uniform throughout the United States." Thus we see from the constitution of the United States that instrument will not bear an interpretation

that makes the least distinction between the citizens of the United States or of the respective states, and Mr. Jefferson in his first inaugeral address laid down the same principal that the constitution of the United States provided "equal and exact justice to all men of whatever state or persuasion, religious or political. This equal and exact justice cannot be obtained if the laws of this country are to be construed more favorably to the rich or the poor, the large or the small dealer, the dealer in imported or domestic goods; and the power over the people of this country can be more properly exercised by the local state government than by the general government.

The power to protect the people in their rights can be more fully obtained from the state governments than from the general government. The state governments have the power to protect and guard the rights of the people in their domestic affairs and can do this more nearly than the general government. The facts in this cause show that in no way could the general government be interested in the matter. The transportation of the goods had closed and Leisey & Co. had the possession, custody and control of the beer, and were selling it within the limits of this state contrary to the laws of this state, and the facts show that the whole transaction was purely an internal transaction that could in no manner be construed to interfere in the least with any of the powers of the general government. And such a transaction is recognized and provided for by Section 3243, revised statutes of the United States, second edition, which provides "the payment of the tax imposed by the internal revenue laws for carrying on any trade or business, shall not be held to exempt any person from the penalty or punishment provided by the laws of any state for carrying on the same within such state, or in any manner to authorize the commencement or continuancy of such trades or business contrary to the laws of such state or in place prohibited by municipal law. * * * *

The prior sections of said statutes provides for a tax for dealing in foreign and domestic liquors, and therefore the language of the section quoted above is applicable to for-

eign and domestic liquors. This section answers the complaint of the argument of the plaintiffs in error as to the action of the legislature of Iowa repealing a clause providing for the sale of intoxicating liquors in the original packages imported into the United States under the laws of the United States, the principles and reason of the powers retained by the states compels us to think that the facts in the cause presents no federal question.

That the laws of the state of Iowa in no manner, directly or indirectly, conflicts with the clause of the constitution of the United States respecting commerce or any other clause of the constitution.

IV.

Plaintiffs also claim that the Iowa statute is unconstitutional, and in contravention of the fourteenth amendment to the Constitution of the United States, that the right to sell intoxicating liquors in Iowa, and elsewhere, is one of the rights and immunities guaranteed to them, as citizens of the United States. One Bartemeyer, made the same same plea, before this court, and the court in 18 Wallace, 133, says:

"The weight of authority is overwhelming that no such immunity has heretofore existed, as would prevent state legislatures from regulating, and even probibiting, the traffic in intoxicating drinks, with a solitary exception. * * But no case has held that such a law was void, as violating the privileges, or immunities, of citizens of a state, or of the United States. If, however, such a proposition is seriously urged, we think that the right to sell intoxicating liquors, so far as such a rignt exists, is not one of these rights growing out of citizenship of the United States, even in this regard. The case falls within the principles laid down by this court in the Slaughter-house cases."

The same plea was made in Mugler vs. Kansas, 123 U. S. And the court, on page 662–3, says:

"Such a right does not inhere in citizenship. Nor can it be said that the government interferes with, or impairs any one's constitutional right of liberty, or of property,

when it determines that the manufacture and sale of intoxicating drinks, for general or medicinal use, as a beverage, are, or may become, hurtful to society, and constitute, therefore, a business in which no one may lawfully engage."

This law of Iowa does not make any distinction between liquors manufactured in Iowa and those brought into the state, from other states, or imported from foreign countries. It levies no tax upon the importer or on the article imported.

It does say that the applicant for a permit to sell liquor must be a "citizen of the United States, and of the State of Iowa." Section 2363, McClain's Code. But it is essential, that the state should provide, that the vender of liquors should be a citizen of the state, in order that, the state may duly execute her police regulations, upon offenders, by fines and imprisonment. This could not be done, if it were allowed to parties, without the state, to violate, with impunity, her laws within the state.

This exact question was passed upon by the Supreme Court of Nebraska in the case of Mette vs. McGuckin, 25 N. W. R., 338, the syllabus of which case is as follows:

"The act of the legislature * * known as the 'Slocum Liquor Law,' is not unconstitutional, as being in violation of the provisions of the Constitution of the United States, which provides 'that the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states'—it being the exercise of the police power of the state for the protection of its citizens, and not for the purpose of revenue, or the regulation of commerce.

In the exercise of such power, it is competent for the legislature to require, that the licensee, shall be a resident of the state, and subject to its laws and the processes of its courts."

The law of that state, like the statute of Iowa, requires that the party to whom the permit to sell intoxicating liquor was issued, should "be a resident" of that state; and

on page 339, the court says: "Any other view would completely destroy the efficacy of the law, and deprive the people of the protection which the law is intended to give."

See, also, Whitney vs. Township Board, 39 N. W. R., 40, to same effect, Mich. Soldier's Home Law.

V.

Plaintiffs second general assignment of error is, that, the Supreme Court of Iowa erred in finding that defendant, Hardin, was entitled to the possession, and was the owner of, the property in controversy, and in rendering a money judgment for value of said property, which it did, and should only have ordered, its destruction. In reply we say:

FIRST. That this is a matter which the plaintiff in error can not have reviewed in this court, because there is no federal question involved in it; and the amount in controversy is only $540.00. If the law of Iowa is constitutional, that fully settles the controversy in this case; but if any error occurred in the findings of the Supreme Court of Iowa, or in the manner, matter or form, in which its judgment was entered up in this action, it can not be reviewed in this court on error, for want of jurisdiction. But,

SECOND. There was no error, in fact, in the judgment of the Supreme Court of Iowa entered in this case.

It will be remembered that it appears in evidence, by the record, page 9, that, after plaintiffs replevied this beer, and got it into their possession, that they sold it. Their witness says he "sold this particular beer, which had been replevied." Record, page 9.

The Supreme Court found *that the defendant "was entitled to the immediate possession thereof (the beer), and that possession thereof was taken from defendant wrongfully.* * * and that defendant expressed his option to have judgment for the value of said property. * * " See Record, page 20. The power to render the judgment, as it was entered, under such circumstances, is expressly given in section 4471, McClain's Code. It reads thus:

"SEC. 4471. PLAINTIFF'S OPTION. *If the party found to be entitled to the property, be not absolutely in possession thereof*, by delivery, under the provisions of this chapter, or otherwise, he may, *at his option*, have execution for the specific delivery of the property, *or for the value thereof as, determined by the jury*." This judgment was right, as held in

54 Iowa, 519, Steam Engine Works vs. Nelson ;
63 Iowa, 580, Laughlin vs. Main ;
62 Iowa, 65 Wavely vs. Moore.

But plaintiffs claim, it was error to render a money judgment in favor of defendant for the value of the beer, because the defendant was only a constable, who had seized the beer, and was, as they say, in no sense the owner of the property, and, at most, was only entitled to the possession of the property to destroy it * * ."

The case of Armel vs. Lendrum, Sheriff, etc., 47 Iowa, 535, is directly in point. In that case, Lendrum, sheriff, had levied an execution upon certain personal property, which the plaintiff replevied out of his hands. He was adjudged to have had the right of possession, of said property by the levy he had made thereon ; and, at the trial, he elected to take a money judgment, not for his personal interest in the property, but for the full value of the property itself ; and the court held there was no error, saying, on page 538 : " He was entitled to a money judgment against the plaintiff and his sureties in replevin bond."

To the same effect is 60 Iowa, 57 Williams vs. Chapman, U. S. Marshal.

VI.

It only remains to notice the two or three rather specious arguments, or points, made by plaintiffs' counsel, and the writer of this argument will then rest the case for such further argument as his associates may deem best to add.

On page 23 of plaintiffs' brief, he says : "So long as the property in controversy is held by the manufacturer, or

importer, in the original form and package in which it is imported into the State, it is within the protection of the Federal Constitution, as an article of commerce."

If the importation of liquor into the State, was simply for the purpose of storage, and not for sale, that would present a different question; for the statute does not forbid storage. But the plaintiffs made and brought the liquors into the State "for sale;" for sale as a beverage, and this the statute does forbid. We are treating a case, and not a condition.

On same page, he says: "So long as the case, or barrel, (of liquor) remains sealed, or unbroken, it is no more hurtful, and no more threatens the health, morals, or the lives of society, than does a barrel of sugar or flour. * * Liquors, in bulk, are not, *per se*, inimical to the public welfare."

The object of the statute is to prevent the drinking of the liquors—and liquors can not be drank "in bulk," although the bulk capacity, of some stomachs, for beer, especially, is very great. Certainly, liquor in an unopened package, will not produce drunkenness. Neither will gunpowder, in a sealed keg, produce destruction; but it is true that the very presence of liquor, at times, threatens life, health, and property, "more than does sugar and flour;" and for this very reason, liquors are never allowed to be sold in times of unusual commotion, riot, or on election days. Strive as plaintiff's counsel may to show, to the contrary, intoxicating liquor is property, is *sui generis*, and must have law applied to its sale, as such property.

In closing, plaintiff's counsel, on page 44, of his argument, says: "The right to replevin intoxicating liquors *upon the ground of the unconstitutionality of the law* under which they were seized, is found in Section 3225, of Code of 1873; McClain's Ann., Code, 4455 * *" which contains the provisions of the law "for the recovery of specific personal property."

As said before, if the liquor law of Iowa itself is unconstitutional, that ends this case; but there is nothing in

this section, 4455, which gives the right of replevin upon the ground of the unconstitutionality of the prohibitory act.

The suit, brought by the plaintiff, was unauthorized and illegal; because, when the beer was replevined by them it was in the "custody of the law," in the hands of the defendant, as constable, which he had seized and then held upon a search warrant, duly issued by Garrettson, a justice of the peace, *in a criminal proceeding*, wherein the State of Iowa was plaintiff and John Leisey *et al.* were defendants, instituted under Section 1544, Statutes of Iowa. All of which facts fully appear in the record.

That this can not be done, is clearly established in

5 Iowa, 438. Funk, *et al.*, vs. Israel.
38 Iowa, 242. State vs. Harris.
47 Iowa, 484. Weir vs. Allen.
49 Iowa, 351. Fries & Co., vs. Porch.

Here the facts were the same as in 47 Iowa, 484; Weir vs. Allen, where the court says: "If it be conceded the police justice had jurisdiction, and the information, and all the proceedings were in strict accord with law, then, as we understand, the liquors in question were in the custody of the law, and cannot be taken therefrom by virtue of the replevin proceedings. This was ruled in Funk & Hardman vs. Israel, 5 Iowa, 438, and in the State vs. Harris, *et al.*, 38 Iowa, 242."

In 38 Iowa, 242, the court also held that such replevin proceedings constituted a criminal conspiracy.

49 Iowa, 351; Fries & Co. vs. Porch, City Marshal of Iowa City, was a replevin suit "for intoxicating liquors in the original packages in which they were imported into the state," which liquors, the defendant, in his official capacity, had seized and held under a search warrant, issued under the same section of the law (1544,) in a criminal action, and in which the defendant consented to a judgment against him, awarding the possession of the liquors to the plaintiff; but this court very promptly held that it was not "* * competent in this state, by sharp practice to defeat the admin-

istration of justice * * with impunity," and reversed the judgment of the District Court, and held that "intoxicating liquors seized under proceedings for their forfeiture, are not subject to an action of replevin."

We respectfully submit the decision of the Supreme Court of Iowa, in this case should be, in all respects, affirmed.

The plaintiffs in error in defiance of the laws of Iowa, transported the beer, in question, into the State of Iowa with intent to sell the same, and did sell beer contrary to the laws of this State of Iowa, and, in defiance of the laws of Iowa, after the same was seized proceeded to replevy the same, contrary to the laws of Iowa, well knowing that the Supreme Court of the State of Iowa, had several times decided that liquors, seized upon under the provisions of this law, owned and kept for sale, and with intent for sale, contrary to the laws of Iowa, could not be replevied.

In the case of Frank vs. Israel, 5 Iowa, page 438, on page 451 the court said: "The prohibitory law provides for the final hearing and adjudication of all causes, originated under it; * * * any person claiming an interest in the liquors seized may appear before the justice of the peace and show cause why they should not be adjudged forfeited, or that they were not owned or kept with intent to be sold in violation of law. He may have a jury to try the issue. He may appeal to a higher court. * * To suffer a party in an action of replevin to take the liquors out of the hands of the officer seizing the same, would be an interference with the administration of justice in criminal proceedings and would defeat the whole object and intention of the prohibitory law. By that law the keeping of intoxicating liquors, for sale, and the sale of the same, is prohibited; the liquors so kept are declared forfeited and must be destroyed. It is easy to perceive, that if they may be replevied out of the hands of the officer seizing them, there will be very few instances in which the object of the statute will be attained by the destruction of the liquors, kept for sale contrary to law, and to the same purport are the following cases:

Musgrove vs. Hall, 40 Maine 498.
State vs. Harris, 38 Iowa, 242.
Weir vs. Allen, 47 Iowa, 484.
Fries & Co. vs. Porch, 49 Iowa, 351.

And in the case of State vs. Harris our court held that such replevin of intoxicating liquors, owned with intent to sell the same contrary to the laws of Iowa, to constitute a criminal conspiracy, and so must all the acts of persons violating the criminal laws of the respective states and the federal government be construed, when attempting to evade those laws, by obtaining the possesion of the forfeited articles of property and thereby prevent their being dealt with according to law, by other legal proceedings.

In this cause the plaintiffs in error in defiance of the law obtained from the officer the liquors, and as the evidence shows, immediately proceeded to sell the same contrary to law, thereby defeating the execution of the law.

Sections 1544 and 1545, Code of Iowa, 1873, provides for the information for search warrant where liquors are held for sale contrary to the laws of Iowa.

Section 1546 provides for the issue of the search warrant, the duty of the officer, the search of the premises and seizure of the liquor found. Notice to the person in control thereof, and posted on the place where found; of the time and place, for hearing as to the said liquor, and at such time any person having any interest in the said liquors may appear and show cause why the same should not be forfeited and destroyed, and for that purpose may have a trial by jury, and shall have the right of appeal.

Therefore it will be seen that these liquors were in the custody of the law, by virtue of process issued in a criminal proceeding, and were waiting the action of the court under the law, by which it was to be ascertained whether or not they were liable to be forfeited, and to a judgment that they be destroyed.

Fries & Co. vs. Porch, 49 Iowa, 351, holds intoxicating liquors, kept for sale in violation of law, are not regarded a

property. They are outside of the protection of the law and unless the party suing avers, and shows that they are in his possession with lawful intent, and that he has been illegally deprived of the same, no action can be maintained for their recovery or possession, whether they are in the custody of the law or not.

Funk & Hardman vs. Hall, 5 Iowa, page 452. The plaintiffs claim the judgment of the Supreme Court in the cause is a very remarkable one, but, be that as it may, there is no federal question involved in the form and substance of the same judgment unless the facts are found that the plaintiffs, in error, were entitled to the possession of the liquors in controversy, and that the statute under which the same liquors were seized is in contravention of the Constitution of the United States. The judgment, to our minds, is in form and substance as it should be.

The defendant, A. J. Hardin, as constable, was, and is, the representative of the State, and in such capacity was proceeding to enforce the laws of the state when the plaintiffs, in error, took from him the liquor seized by him, and by the terms of the statute (Section 1544, Code of Iowa, 1873,) he was directed "to keep the same securely until final action be had thereon."

The question to be determined was, who was entitled to the possession of the liquor at the time of the issuance of the writ of replevin.

Cassel vs. The Western State Company, 12 Iowa, 48 and 49; Code 1873, of Iowa, Sections 32–38.

The form of the judgment is provided for by Section 32–39, Code of Iowa, 1873.

In the cause of Fries & Co. vs. Porch, 49 Iowa, on page 357, is said: "The court should have rendered judgment for the return of the liquors, to the custody of the officer, and in default of such return for their value, and on page 359 "to order that they be returned to said marshal to be dealt with as provided by law and in default of said

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JAMES C. DAVIS, for Plaintiffs in Error.

H. SCOTT HOWELL AND WILLIAM E. COLLINS, for Defendant in Error.

REPLY FOR PLAINTIFFS IN ERROR.

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REPLY FOR PLAINTIFFS IN ERROR.

I.

Counsel for Defendant in Error cite and rely largely upon the License Cases reported in 5th Howard, p. 504. In these cases there was no opinion by the court, but each of the judges filed separate opinions, giving different reasons for the conclusions arrived at. The doctrine of many of these separate opinions has since that time been abandoned by this court.

In Woodruff vs. Parkham, 8 Wall. 139, Mr. Justice Miller in delivering the opinion refers to the License Cases as follows: "The separate and diverse opinions delivered by the judges on that occasion leave it very doubtful if any material proposition was decided."

Mr. Justice Field in his separate opinion in the Mugler case, 123 U. S., 676, says: "The construction of the commercial clause of the Constitution upon which the License Cases were decided, appears to me to have been substantially abandoned in later decisions." (See cases cited in that opinion.)

In the cases of Beer Co. vs. Mass, 97 U. S. 832.
Mugler vs. Kansas, 123 U. S. 623.
Powell vs. Pa., 127 U. S. 679.

And most of the other cases cited by counsel for defendant, where state legislation of a prohibitory character has been sustained, the commercial clause of the Constitution was not under consideration, the commercial rights of citizens of other states were not involved, and the conclusion arrived at by this court in these cases, is largely based upon the fact that the matters therein involved were purely *internal*, and therefore absolutely under the police power, there being in such cases no conflict between the police and the commercial powers.

In Pearson vs. International Distillery, 128 U. S. p. 1 the opinion of the court rests upon the fact that the process of manufacturing and producing an article of commerce is an *internal* affair, and until the manufacture of the article is completed, the state has full power over its production and manufacture, and it is not until it appears as an article of commerce that the Federal constitution can protect it.

II.

Counsel for defendant combat the proposition discussed in Section II of plaintiff's argument, namely: "That the absence of Congressional legislation is an indication that commerce shall be free and untrammeled." An examination of the authorities cited by defendant, will reveal the fact that they refer to matters of quarantine and port regulation, which have uniformly been recognized as matters of local concern, and have formed an exception to the general rule, for which we are contending. When the doctrine is applied to an article of commerce, which is produced and sold alike in every separate state in the union, and is a part of "a commerce that is national in its character and admits of one uniform system or plan of regulation," the authorities so cited have no application.

III.

Section 3243 of the Revised Statutes of the United States is cited, but the reasons for the citation are so obscurely stated, that its application to the case at bar is not apparent. It certainly is not a regulation of commerce by Congress. It is not an attempt to delegate to the legislatures of the several states a power confided exclusively in congress; such delegation of power even if attempted, would be of no avail, for such power cannot be delegated.

Cooley on Constitutional Limitations p. 116 (Ed. of '68), where it is said: "One of the settled maxims in constitutional law is that power conferred upon the legislature to make laws cannot be delegated by that de-

partment to any other body or authority. Where the sovereign power of the state has located the authority there it must remain, and by the constitutional agency alone the laws must be made until the Constitution itself is changed."

IV.

It is conceded by counsel for defendant, "if the liquor law of Iowa itself is unconstitutional that ends the 'case' (defendant's brief p. 47) and plaintiff's have a right to maintain replevin.

As was said by this court in Norton vs. Shelby Co., 118 U. S. 442: "An unconstitutional act is not a law, it confers no rights, it imposes no duties, it affords no protection, it creates no office, it is in legal contemplation as inoperative as though it had never been passed."

If as plaintiffs contend the law is unconstitutional, the authorities cited by defendant at page 48 of their brief by which it is claimed intoxicating liquors cannot be the subject of replevin have no application, and the authorities cited by plaintiff in section X. of their brief control. The court will note that Section 3225 of Code of '73, (plaintiff's brief p. 44,) expressly authorizes replevin of property from the hands of an officer when facts are stated "constituting an exemption from seizure by such process," and in Cooley vs. Davis 34 Ia, 128, it is expressly held that intoxicating liquors seized and held by an officer under a law that is unconstitutional may be the subject of replevin, the Iowa Supreme court said: "Nor can property seized under an unconstitutional law, any more be said to be seized under legal process than if the process issued without law." (See additional authorities cited, plaintiff's brief sec. X.)

V.

The only Iowa case which holds, that an officer should obtain a money judgment for liquor wrongfully replevined from him, in which the only interest he had in it was to destroy the liquor, is Funk vs. Israel, 5 Iowa, 450, and the dissenting opinion by Judge Wright in that case appears to be based upon a much sounder doctrine than is the majority opinion.

The latter case was determined under section 2001 of the Code of 1851, which provided: "If plaintiff fail to establish his right to the property, the defendant shall recover such damages as under the circumstances he shows himself entitled to."

The present case is governed by section 3239, of code of 73, McClaine's code, 4469, which provides: "The judgment shall determine which party is entitled to the possession of the property, and shall designate *his right thereon*," and if such party shall not have the possession thereof, shall also determine the value of the right of such party." The only right the constable had in said property was to destroy it, and the value of such right, is nothing so far as a money value is concerned. It is not attempted by reason or authority to justify the legislative action of the Supreme Court of Iowa, in apportioning the amount of this money judgment among the constable and his attorneys.

VI.

Counsel for defendant greatly magnify the moral effect of holding this law unconstitutional in the particu-

lar which is here contended for, a legitimate commerce in liquors, in the form and package as recognized articles of commerce, cannot have the demoralizing effect predicted.

Experience in laws of this character has shown their entire inadequacy to attain the object sought after. The increase in perjury, and their open violation have made it very questionable, if they do not produce and foster more crime and immorality than they suppress, and such laws do not appreciably diminish the consumption of intoxicating liquors, but upon this question this court has said with reference to the use of the police power: "*No urgency* for its use can authorize a state to exercise it in regard to a subject matter which has been exclusively confided to congress by the Constitution." (Henderson vs. Mayor of New York, 92 U. S., 271.) "It cannot without the consent of congress, express or implied, regulate commerce between its people and those of the other states of the union in order to affect its ends *however desirable such a regulation might be.*" (Bowman vs. R'y 125 U. S., 465.)

Respectfully submitted.

JAMES C. DAVIS,

For Plaintiffs in Error,

Office Supreme Court, U. S.
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IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1889.

GUS LEISY & Co.,
Plaintiffs in Error,
vs.
A. J. HARDIN, Constable,
Defendant in Error.

Writ of Error to the Supreme Court of Iowa.

MOTION TO PERMIT FILING OF BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

JAMES C. DAVIS, for Plaintiffs in Error.

LOUIS J. BLUM and EDGAR C. BLUM, for Plaintiffs in Error.

H. SCOTT HOWELL and WILLIAM B. COLLINS, for Defendant in Error.

A. B. CLARKE, Law Printer, Room 8, Methodist Church Block, Chicago.

IN THE

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Defendant in Error.

Now come Louis J. Blum and Edgar C. Blum, attorneys and counsellors of the court, and move the court to grant them leave to file a brief in this case, and, in support of said motion respectfully submit the following grounds:

This cause has already been submitted to the court and taken under Rule 20. The principle involved is as to the right to sell, in Iowa, liquor imported from other states and sold in its original packages, at its place of destination. We have several cases involving the identical question, in two of which, *Bowman* v. *The State of Iowa*, writs of error have already been allowed to the Supreme Court of Iowa. All of these cases will be presented to the court at the next term. A decision in this case will be conclusive in those; and therefore we ask leave to present our views very

briefly before a final determination of the question involved.

We may add that we have been requested by Mr. Davis, the attorney for plaintiffs in error in the above entitled cause, to present a brief for plaintiffs in error herein, if the court will receive it, as evi-evidenced by a letter written by him to the clerk of the court and now in his possession. This motion is, therefore, made on behalf of plaintiffs in error in this case, as well as on behalf of the parties interested in the other cases referred to herein, as involving the same question.

We have prepared a short brief, to depend up this motion, and respectfully pray for leave to file it in this case.

Respectfully submitted,

LOUIS J. BLUM,

EDGAR C. BLUM.